84-68 (1)

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. CAN INDIAN TRIBES WHICH HAVE REFUSED TO BECOME ORGANIZED UNDER THE INDIAN REORGANIZATION ACT OF 1934 AND WHICH HAVE REFUSED TO ADOPT TRIBAL CONSTITUTIONS UNILATERALLY IMPOSE TAXES ON NON-INDIANS WITHOUT APPROVAL FROM THE SECRETARY OF THE INTERIOR?

II. CAN UNORGANIZED INDIAN TRIBES ASSERT AUTHORITY OVER NON-INDIAN OIL AND GAS LESSEES WHEN THE CONTROLLING ACT OF CONGRESS PERMITS THE EXTENSIVE FEDERAL REGULATION TO BE SUPERSEDED ONLY BY ORGANIZED INDIAN TRIBES, IN ACCORDANCE WITH THE PROVISIONS OF THEIR TRIBAL CONSTITUTIONS?

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* Pursuant to the provisions of Rule 28.1, Rules of the Supreme Court of the United States, the following is a list of all subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner Kerr-McGee Corporation: Kerr-McGee Oil (U.K.) Ltd.; San-Ann Premium Center, Inc.; Sunningdale Oils (Abu Dhabi), Ltd.; Sunningdale Oils (Ireland), Ltd.; Transocean Drilling Company, Ltd.; Transocean Drilling (Curacao) N.V.; Transhore Drilling (Curacao) N.V.; Transworld Drilling Company (Nigeria), Ltd.; White Shoal Pipeline Corporation; Basic Management, Inc.; Bikita Minerals (Private), Ltd.; Crescent Petroleum Company; Downtown Airpark, Inc.; Little Medicine Development Co.; Oklahoma Stations, Inc.; San-Ann Service, Inc.; and Texoma Pipe Line Company.

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Petitioner Kerr-McGee Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on April 17, 1984. The respondents to this petition for writ of certiorari will be the tribal officials who were appellants and cross-appellees before the Ninth Circuit — namely, tribal chairman Peterson Zah and the director and members of the Navajo Tax Commission: Delfred Wauneka, Robert Shorty, Jr., Glenn George and William Morgan, Jr.

OPINIONS BELOW

The opinion of the Court of Appeals in *Kerr-McGee Corp. v. Navajo Tribe of Indians, et al.*, is reported at 731 F.2d 597. (App. A, *infra*, at 1-12). The opinion of the District Court was not reported. (App. B, *infra*, at 1-23).

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. United States Code, Title 25:

Section 636. Adoption of Constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship.

2. United States Code, Title 25:

Section 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

3. United States Code, Title 25:

Section 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or

band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Section 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to acept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the rights of tribes organized and incorporated under Sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471, 473, 474, 475, 476 to 478, and 479 or this title.

Section 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the

Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

4. Code of Federal Regulations, Title 25:

Section 211.29. Exemption of leases made by organized tribes.

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

STATEMENT OF THE CASE

Encompassing an area larger than the States of Connecticut, Delaware, Massachusetts, New Jersey and Rhode Island, the Navajo Indian Reservation occupies over 24,000 square miles of land set aside by treaty, statute and executive order in the States of Arizona, New Mexico and Utah. The Navajo Tribe has never adopted a Constitution despite the fact that Congress twice invited it to do so. It refused to become organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and it also refused to become organized under Section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 636.

Petitioner extracts oil and gas from certain lands of the Navajo Indian Reservation in Arizona [1] set aside by treaty pursuant to five valid and binding leases issued by the Navajo Tribe and approved by the Secretary of the Interior. The first of these leases was issued in 1964. In 1978, the Navajo Tribal Council adopted a "Business Activity Tax" and a "Possessory Interest Tax." Both of these taxes purport to empower the Navajo Tax Commission to impose a number of penalties in the event of noncompliance, including "permanent loss of all right to engage in productive activity" on the reservation. Neither of these taxes was ever approved by the Secretary of the Interior.

The Business Activity Tax purports to require petitioner: (1) to file declarations of tax due on February 15, May 15, August 15 and November 15 of each calendar year, (2) to pay taxes purportedly due on the said dates, and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax purports to be effective as of July 1, 1978, and purports to apply to every sale, either within or without the reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%).

The Possessory Interest Tax purports to require petitioner: (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one-half (½) due on February 15 and one-half (½) due on August 15 of each calendar year. The tax purports to apply to every leasehold interest on or under the reservation that has a value in excess of $100,000 at a rate of

[1] Petitioner, through its wholly-owned subsidiary Quivira Mining Company, also mines uranium from certain lands of the Navajo Indian Reservation in New Mexico set aside by executive order; however, the issue as to validity of tribal taxation of these activities is still pending in the United States District Court for the District of New Mexico. See footnote 2, *post*, and accompanying text.

not less than one percent (1%) nor greater than ten percent (10%) of the leasehold value.

On May 10, 1979, petitioner filed its complaint in the United States District Court for the District of New Mexico against the Navajo Tribe, the Navajo Tax Commission, the tribal chairman and the members of the tribal tax commission, seeking a declaration that the tribal Business Activity Tax and Possessory Interest Tax were void and invalid, as well as an injunction enjoining any enforcement of these taxes. Petitioner alleged that the respondent tribal officials, by seeking to enforce the taxes, were acting beyond the limits of their lawful tribal authority. Jurisdiction was asserted under 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

On September 27, 1979, the Honorable E. L. Mechem dismissed petitioner's claims against the Navajo Tribe and the Navajo Tax Commission on the basis of tribal sovereign immunity. On March 12, 1980, Judge Mechem transferred, over petitioner's objections, petitioner's action insofar as it pertained to petitioner's oil and gas leases in Arizona to the United States District Court for the District of Arizona. [2]

All activity in the Arizona district court was stayed pending resolution by this Court of the then pending case of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). After the *Merrion* decision was released, the Arizona district court entertained motions for summary judgment that had been filed by both petitioner and respondents. On June 29, 1982, the Honorable William P. Copple rendered his memorandum and order (App. B at 1-23) which granted summary judgment in favor of petitioner [3] on the basis that the Business Activity Tax and the Possessory Interest Tax were void

[2] The portion of petitioner's action relating to the New Mexico uranium leases was retained in the United States District Court for the District of New Mexico, which stayed the action on its own motion over petitioner's objections.

[3] Judge Copple also rejected all of the other claims asserted by petitioner.

and invalid because they had not been approved by the Secretary of the Interior. In addition to holding that the respondents were collaterally estopped from relitigating the validity of these taxes in view of the declaration of their invalidity by the United States District Court for the District of Utah in *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140 (D.Utah),[4] Judge Copple also held that *Merrion* requires all tribes to obtain approval from the Secretary of the Interior before they can impose taxes on non-Indians.

The respondents appealed this determination to the Ninth Circuit Court of Appeals. Petitioner filed a cross-appeal of the district court's rejection of the federal pre-emption, treaty limitations on tribal power and commerce clause claims. The United States filed an *amicus curiae* brief in support of the respondents' position, and urged that Secretarial approval was not required for tax ordinances imposed by Indian tribes that have no Constitutions and that have refused to become organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.[5] Oral argument was held in San Francisco on April 15, 1983. Later that day, the three

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[4] Since the district court relied in part on the Utah decision, a copy of that unreported decision is set forth in App. C, *infra*, at 1-14, in accordance with Rule 21.1(k) (ii), Rules of the Supreme Court.

[5] On the other hand, in response to questions raised by Chief Justice Burger during the November 4, 1981 oral argument in *Merrion v. Jicarilla Apache Tribe*, the United States represented to this Court that the statutes setting forth the general responsibility of the Secretary to supervise relations between Indians and non-Indians vest the Secretary with authority to approve — and to disapprove — tribal exercises of civil jurisdiction over non-Indians:

> At all events, I would suggest that there remains residual power in the Secretary under Section 2 of Title 25, Section 9, to disapprove, and certainly to refuse to implement any ordinance enacted by a tribe which bears on others than members, and which he has not approved and would affirmatively disapprove, that that residual power could be exercised in any such case.

Transcript of Oral Argument at 43. Why the United States is now repudiating these representations should be addressed by this Court.

judge panel deferred submission pending decision by the Tenth Circuit Court of Appeals in the *Southland Royalty Co.* case.

On August 22, 1983, the Tenth Circuit reversed the determination by the federal district court in Utah that the respondents' taxes required Secretarial approval. *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir.). That case is still pending, however, before the Tenth Circuit Court of Appeals on a petition for rehearing en banc.

The Ninth Circuit rendered its decision on April 17, 1984. The three judge panel — apparently disregarding this Court's holding in *Merrion* that secretarial approval was necessary to "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies," 455 U.S. at 141 — held that

> Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters.

App. A at 12. In addition, the panel rejected petitioner's pre-emption claim by holding that — notwithstanding the *explicit* distinction between organized and unorganized tribes that Congress drew in 25 U.S.C. § 396b — the purpose of that legislation

> was not to generate distinctions between tribes organized under the IRA and tribes not so organized. . . .

App. A at 6.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN MERRION v. JICARILLA APACHE TRIBE

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court held that with approval from the Secretary of the Interior, the Jicarilla Apache Tribe, which had adopted a Constitution in accordance with section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, could impose a severance tax on non-Indian production of oil and gas on the reservation. Justice Marshall explained that while "neither the Tribe's Constitution nor the federal Constitution is the font of any sovereign power of the Indian tribes," *Id.* at 148 n.14, an amendment to the tribal constitution authorizing the tax was "the critical event necessary to *effectuate* the tax." *Id.* (emphasis by the Court). The Court could not possibly have been more explicit in holding that adoption of a Constitution under the Indian Reorganization Act announcing tribal intention to tax non-members, as well as Secretarial approval of the tribal tax, were part of "the administrative process established by Congress to monitor such exercises of tribal authority":

> Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe was required again to obtain approval from the Secretary.

455 U.S. at 155. Indeed, in distinguishing tribal taxation from federal and state taxation, this Court explained that:

> These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Id. at 141.

The Ninth Circuit, however, did not even bother to address these holdings. Instead, it held, without a single citation of authority, that "Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters." (App. A at 12). In short, the Ninth Circuit declined to follow this Court's holdings (1) that "Congress has affirmatively acted by providing a series of federal check-points that must be cleared before a tribal tax can take effect", (2) that authorization to tax in a tribal constitution is "the critical event necessary to *effectuate* the tax," and (3) that Secretarial approval was necessary to minimize the "potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner and [to] ensure that any exercise of the tribal power to tax will be consistent with national policies." According to the Ninth Circuit, an unorganized Indian tribe, if it so desires, may unilaterally impose an unfair and unprincipled tax totally at odds with national policies. [6]

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[6] The Ninth Circuit's decision below is inconsistent with an extensive line of cases in which tribal ordinances have been approved by the Secretary. *E.g., Rice v. Rehner*, _____ U.S. _____, 77 L.Ed.2d 961 (1983); *New Mexico v. Mescalero Apache Tribe*, _____U.S. _____, 76 L.Ed.2d 611 (1983); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). In fact, there was Secretarial approval or organization under the Indian Reorganization Act of 1934 in each of the lower court decisions on which the majority in *Merrion* had relied: *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); and *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958).

II. THE DECISION BELOW CONFLICTS WITH THE CONTROLLING ACT OF CONGRESS AND EMASCULATES THE EXTENSIVE FEDERAL SCHEME OF SUPERVISION OVER RELATIONS BETWEEN INDIANS AND NON-INDIANS

Under the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.*, all oil and gas leases between Indians and non-Indians must be approved by the Secretary. Without Secretarial approval, the leases themselves are invalid. *See, e.g., Lawrence v. United States*, 381 F.2d 989 (9th Cir. 1967). In addition, Congress has placed the responsibility for continuing supervision and regulation of these leases in the Secretary. 25 U.S.C. § 396d and 25 C.F.R. Part 211. Incredibly, the Ninth Circuit's decision below allows the Navajo Tribe *unilaterally* to tax and regulate[7] oil and gas lessees with whom it could not have even contracted in the absence of Secretarial approval.

The Court held in *Merrion* that there had been no preemption of the Jicarilla Apache Tribe's power to tax non-Indian oil and gas production because the Congressionally mandated procedure for oil and gas leasing contained an exception for those tribes which had adopted Constitutions or Charters under the Indian Reorganization Act:

> However, the proviso to 25 U.S.C. § 396b states that "the foregoing provisions *shall in no manner restrict the right of tribes* . . . to lease lands for mining purposes . . . *in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, [464-475, 476-478], and 479 of this title,*" (emphasis added). Therefore, this Act does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its Revised Constitution, when both the Revised constitution and the ordinance authorizing the tax are approved by the Secretary.

455 U.S. at 150 (emphasis by the Court).

The Ninth Circuit, however, refused to acknowledge the exceptions explicitly set forth by the Congress in 25 U.S.C. § 396b for tribes which had adopted constitutions or charters under the Indian Reorganization Act. It attempted to explain that the purpose of 25 U.S.C. § 396b

> was not to generate distinctions between tribes organized under the IRA and tribes not so organized, but rather was to "bring all mineral leasing matters in harmony with the Indian Reorganization Act."

App. A at 6. This statement — totally aside from its disregard of the distinction between organized and unorganized tribes explicitly drawn by Congress in the statute itself — incredibly attempts to achieve "harmony" with the Indian Reorganization Act by permitting *unorganized* tribes to exercise *without* Secretarial approval those powers that Congress permitted only *organized* tribes to exercise *with* Secretarial approval. The Ninth Circuit's decision below, if permitted to stand, will effectively emasculate the extensive scheme of federal supervision and approval that the Con-

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[7] For example, 25 C.F.R. § 211.27 permits leases to be cancelled only by the Secretary. *See Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.), *cert. denied*, 52 U.S.L.W. 3461 (1983) (holding that only the Secretary can terminate a commercial lease issued with Secretarial approval pursuant to 25 U.S.C. § 415). However, both the Business Activity Tax (Section 26) and the Possessory Interest Tax (Section 17) purport to authorize the Navajo Tribe unilaterally to terminate petitioner's oil and gas leases by means of "permanent loss of all rights to engage in productive activity with the Navajo Nation."

gress has established for the entire gamut of dealings between Indians and non-Indians. [8]

III. THE DECISION BELOW RAISES SERIOUS AND RECURRING PROBLEMS

A. The Decision Below Raises Serious And Recurring Problems Concerning Fundamental Fairness And Basic Liberties on Indian Reservations

After *Merrion v. Jicarilla Apache Tribe, supra,* the lower federal courts have upheld increasing tribal assertions of civil authority over non-Indians. See, *e.g., Snow v. Quinault Indian Nation,* 709 F.2d 1319 (9th Cir. 1983), *cert. denied,* 52 U.S.L.W. 3860 (1984) (upholding a tribal tax and licensing scheme that penalized employers with non-Indian employees); *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir.), *cert. denied,* _____ U.S. _____, 74 L.Ed.2d 277 (1982) (upholding tribal building and health regulations imposed on non-Indians occupying non-Indian land); *Knight v. Shoshone & Arapahoe Indian Tribes,* 670 F.2d 900 (10th Cir. 1982) (upholding application of tribal zoning code to non-Indian owned lands). Moreover, although *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), prohibited the exercise of tribal *criminal* authority over non-Indians, tribes are now characterizing their legislation as "civil" instead of "criminal" when they seek to apply it to non-

[8] *See, e.g.,* 25 U.S.C. § 81 (contracts between Indian tribes and non-Indians), § 81a and b (contracts between Indian tribes and lawyers for prosecution of claims against United States), § 84 (assignment of contracts), § 85 (contracts regarding tribal funds and property in the hands of the United States), §§ 261 and 262 (regulation of Indian traders), §§ 311, 312, 319, 321 and 323 (rights-of-way), § 320 (acquisition of Indian lands for reservoirs and materials), § 379 (sale of allotted lands), §§ 396a-g and 399 (leasing of Indian lands for mining purposes), § 397 (leasing of Indian lands for oil and gas purposes), § 402a (leasing of Indian lands for farming purposes), §§ 406 and 407 (sale of timber on Indian lands), § 415 (lease of Indian lands for public, religious, educational, recreational, residential, business, and other purposes), and § 452 (contracts with the States for education, medical attention, relief and social welfare of Indians).

Indians. For example, in *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert. denied,* 52 U.S.L.W. 3720 (1984), the Ninth Circuit held that the Navajo Tribe could punish certain activity engaged in by an Indian as a "criminal offense," while punishing the same activity engaged in by a non-Indian as a "civil offense." Obviously, it is now more important than ever before that this Court address federal supervision and control over what appear to be quantum leaps in the exercise by Indian tribes of "civil" jurisdiction over non-Indians.

The concern for fairness in the context of tribal assertions of civil authority over non-Indians is serious and compelling. Indian tribes, unlike every other governmental authority in the United States, are not subject to the constraints on the exercise of governmental authority set forth in the Bill of Rights and the Fourteenth Amendment. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978); *Talton v. Mayes,* 163 U.S. 376 (1896). In fact, widespread abuses of tribal power caused the Congress to enact the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.,* which by statute purported to extend the protections of the Bill of Rights to persons affected by the exercise of tribal authority. [9] See *Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations pursuant to S.Res. 194,* 89th Cong., 2d Sess., p. 3, 4, 5 (1966).

Nevertheless, in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), this Court held that the protections that were supposed to be afforded by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.,* are incapable of enforcement because the Act did not waive tribal sovereign immunity, 436 U.S. at 59, and because violations of the Act do not give

[9] In fact, the Congress was particularly concerned about such abuses by the Navajo Tribe, as reflected in *Native American Church v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959) (Navajo Tribe may enact ordinances violating the right of freedom of religion because the First Amendment is inapplicable to the Navajo Tribe).

rise to implied private rights of action against either the tribe or the tribal officials. *Id.* 69-70. The Ninth Circuit [10] has followed *Santa Clara Pueblo* by absolutely refusing to entertain any claims of tribal violations of the "protections" set forth in the Indian Civil Rights Act of 1968. *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980). The only "protection" under the Indian Civil Rights Act of 1968 is a writ of *habeas corpus*, which as Justice White noted in *Santa Clara Pueblo, supra*, "is unlikely to be available to redress violations of freedom of speech, freedom of the press, free exercise of religion, or just compensation for the taking of property." 436 U.S. at 75 n.3 (dissenting). As Justice Stevens predicted in *Merrion, supra*, "Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community." 455 U.S. at 170 (dissenting). Without meaningful federal supervision and control, tribal exercises of unfair or unprincipled "civil" jurisdiction will inevitably lead to intolerable conflict between Indians and non-Indians.

B. The Decision Below Raises Serious And Recurring Problems Concerning The Organization Of, And Federal Supervision Over, Tribal Governments.

The effect of the Ninth Circuit's decision below is to reward those Indian tribes which have rejected the Indian Reorganization Act and which have refused to adopt a Constitution by vesting them with the ability to exercise absolute and unlimited civil authority over non-Indians without any federal supervision or control at all. Obviously, the need for Secretarial approval is more pressing with those

[10] On the other hand, the Tenth Circuit, in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), has held that the limitations placed by this Court on claims arising under the Indian Civil Rights Act of 1968 "disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian." *Id.* at 685.

tribes which have not adopted any constitution, since the "potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner . . .", *Merrion, supra*, 455 U.S. at 141, is most pronounced in those cases.

Moreover, the decision below will serve only to encourage the vast majority of Indian tribes which have responsibly organized their governments and adopted Constitutions in accordance with section 16 of the Indian Reorganization Act *to disorganize* their governments and *to repudiate* their Constitutions and the Indian Reorganization Act. Once that is done, then under the Ninth Circuit's decision below, federal supervision and control is eliminated. Needless to say, the result is total emasculation of the Indian Reorganization Act. As Justice Stevens noted in *Merrion, supra*,

> To the extent that the power to tax was an attribute of sovereignty possessed by Indian tribes when the Reorganization Act was passed, Congress intended the statute to preserve those powers *for all Indian tribes that adopted a formal organization under the Act.*

455 U.S. at 173 n.24 (dissenting) (emphasis added). To hold now that the power to tax may be exercised by tribes that have rejected formal organization under the Indian Reorganization Act is to hold, in effect, that the enactment by Congress of that legislation was, at best, a complete nullity, and at worst, an act of Congressional deceit to mislead most Indian tribes into voluntarily surrendering tribal powers by organizing under legislation touted to them as strengthening tribal powers.

IV. CONCLUSION

Because non-Indians have no recourse at all as to tribal exercises of unlimited civil authority, close federal supervision and approval is essential. That is precisely why Congress erected the federal checkpoints in the Indian Reorganization Act of 1934 and why this Court confirmed that federal approval of tribal taxes was necessary in *Merrion v. Jicarilla Apache Tribe*, which the Ninth Circuit declined to follow.

Eliminating federal supervision precisely where it is most urgently needed, the Ninth Circuit's decision below emasculates the entire federal supervisory scheme over relations between Indians and non-Indians. In addition, it trivializes the Indian Reorganization Act of 1934 by rewarding those Indian tribes which have resisted its policy of tribal organization under a Constitution. Thus, the ineluctable result of the Ninth Circuit's decision below is that every Indian tribe that has followed the Congressional policy of the Indian Reorganization Act and has adopted a Constitution will now be encouraged to disorganize, to abandon their Constitutions and to forsake the Indian Reorganization Act so as to circumvent the Congressionally established scheme of extensive federal supervision over Indian/non-Indian relations that dates back to the very beginnings of this Nation.

This Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review, and to reverse summarily, its decision below.

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July 1983

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KERR-McGEE CORPORATION, a Delaware corporation, Plaintiff-Appellee, vs. NAVAJO TRIBE OF INDIANS, Defendant-Appellant.	No. 82-5725 USDC No. CV 80-247 PHX WPC
KERR-McGEE CORPORATION, a Delaware corporation, Plaintiff-Appellant, vs. NAVAJO TRIBE OF INDIANS, a tribe of American Indians recognized by the United States Department of the Interior, et al., Defendants-Appellees.	No. 82-5736 USDC No. CIV 80-247 OPINION

On Appeal from the United States District Court for the District of Arizona
Honorable William P. Copple, Presiding

Argued: April 15, 1983
Submitted: August 22, 1983
Decided: April 17, 1984

Before: MERRILL, SKOPIL and FERGUSON, Circuit Judges.

MERRILL, Circuit Judge.

Kerr-McGee Corporation is a Delaware corporation engaged in business in New Mexico and Arizona. The Navajo Tribe of Indians is a tribe of American Indians situated upon a reservation created in part by treaty and in part by executive order in the states of Arizona, New Mexico, and Utah. The Tribe has no written constitution, but its self-governing powers are vested in the Navajo Tribal Council.

Kerr-McGee is a non-Indian mineral lessee of the Tribe. Since 1964, it has, under leases approved by the Secretary of the Interior, engaged in mining uranium and extracting oil and gas from portions of the Navajo reservation in New Mexico and Arizona. In 1978, the Tribal Council adopted two new taxes directly affecting the Kerr-McGee operations: a tax presently set at 3% on the value of mining leasehold interests on reservation lands of a value in excess of $100,000 (the Possessory Interest Tax) and a tax presently set at 5% on the gross receipts of certain business activities conducted on the reservation, including every sale within or without the reservation of a "Navajo good or service" (the Business Activities Tax).

By this action Kerr-McGee seeks to invalidate the taxes. In its complaint it charges that for many reasons the Tribal Council was without power to impose such taxes on non-Indians. The District Court rejected most of Kerr-McGee's contentions and granted summary judgment in favor of the Tribe on the counts of the complaint on which those contentions were based. Kerr-McGee has appealed from that judgment. The Court did, however, hold that the taxes were nevertheless invalid because the Tribe had not secured the approval of the tax by the Secretary of the Interior, an action which the Court held to be a requirement. It granted summary judgment in favor of Kerr-McGee on the count asserting that ground for invalidity. The Tribe has appealed from that judgment.

In its judgments the District Court in all respects followed the holding of the District Court for the District of Utah in the case of *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140 (D. Utah, March 8, 1979). That case involved the precise questions presented here: the validity of the Tribal taxes on oil and gas leases and on gross receipts. The decision in that case was appealed to the Court of Appeals for the Tenth Circuit and that Court has now affirmed the Utah District Court on those portions of the judgment favoring the Navajo Tribe but has reversed the Utah District Court in its holding that approval of the tax by the Secretary of the Interior was required. *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983).

KERR-McGEE APPEAL

I. Inherent Power to Tax Lessees—

In Count I of its amended complaint Kerr-McGee asserts that, as to it, the Tribe is without the inherent power to tax; that by virtue of its leasehold Kerr-McGee has a right to presence within the reservation and cannot be excluded by the Tribe and that the Tribe, having no power to exclude, has no power to tax.

The Supreme Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), has held otherwise. It has made it clear that Indian tribes do have the inherent power to tax mining activities carried on within the reservation under lease from the tribes; that the power to tax is an essential attribute of Indian sovereignty and a necessary instrument of self-government. "[The power to tax] derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137. The Court makes it clear that Kerr-McGee's status as lessee does not deprive the Tribe of power to tax it; that such power is inherent in sovereignty and does not stem exclusively from the power to exclude one from tribal lands. Moreover, as the Court acknowledged in *Merrion*, the Tribe's interest in levying taxes for essential governmental programs on nonmembers

" 'is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.' " 455 U.S. at 138, *quoting Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980). If the Tribe's interest was found sufficiently strong in the case of the oil and gas severance taxes in *Merrion*, they can be no less strong here. [1]

Since *Merrion* there can be no question that the Navajo Tribe has the inherent power to tax the mineral leases and operation of Kerr-McGee.

II. Treaties of 1850 and 1868—

In Count II of its amended complaint Kerr-McGee alleges that both the Treaty of 1850, 9 Stat. 974, and the Treaty of 1868, 15 Stat. 667, bar the Navajo Tribe from taxing non-Indians.

With respect to the Treaty of 1850, Kerr-McGee asserts that Article III surrenders all civil jurisdiction to the United States. That provision states in relevant part:

> The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajos . . .

9 Stat. at 974. Yet this language does no more than recite that it is the federal government, and not the states, that possesses regulatory power over commerce and trade with the Tribe. That federal exclusivity of power as to the states does not undermine the ability of the Tribes to legislate in areas of retained sovereignty, unless Congress legislates to the contrary. *See Santa Clara Pueblo v. Martinez*, 436 U.S.

[1] The Court points out that in *Washington v. Confederated Tribes of Colville Indian Reservation, supra*, it "noted that official executive pronouncements have repeatedly recognized that 'Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands . . . including the jurisdiction to tax.' " 447 U.S. at 139. The Court notes that both the executive and legislative branches have "acknowledged that the tribal power to tax is one of the tools necessary to self-government and territorial control." *Id.*

49 (1978). In that context, there is nothing in the quoted Treaty language which would inhibit the Navajo's taxation of non-Indians. *See United States v. Wheeler*, 435 U.S. 313 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Babbit Ford v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983).

With respect to the Treaty of 1868, Kerr-McGee asserts that Article IX expressly prohibits Tribe interference with its oil and gas operations. That provision states:

> [The Tribe] will not in future oppose the construction of railroads, wagonroads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States.

15 Stat. at 670. Kerr-McGee argues that its oil and gas operations are works of utility and that by taxing its operations, the Tribe "opposes" them. We find this argument wholly without merit. Placed in context, it becomes clear that this portion of the Treaty was concerned with a cessation of armed hostility on the part of the Tribe, and not with its power to tax. [2]

[2] In the Treaty of 1868, the Tribe agrees to cease hostilities:

> 3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.
>
> 4th. That they will never capture or carry off from the settlements women or children.
>
> 5th. They will never kill or scalp white men, not attempt to do them harm.
>
> 6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; . . .

We note additionally that Kerr-McGee cites no authority, and we are aware of none, that equates oil and gas operations with a "work of utility" for the purposes of the Treaty. Kerr-McGee's reliance on *United States v. Andrews*, 179 U.S. 96 (1900), which finds the Chisholm Trail to be a work of utility such that cattle-rustling was violative of the Treaty, is inapposite.

III. The Mineral Leasing Act of 1938—

In Count III of its amended complaint, Kerr-McGee asserts that the Mineral Leasing Act of 1938 has preempted all power of the Navajo Tribe to tax non-Indians. The Act, 25 U.S.C. § 396 *et. seq.*, provides in part at § 396d: "All operations under any oil, gas, or other mineral lease issued pursuant to the terms [of any act affecting restricted Indian lands] shall be subject to the rules and regulations promulgated by the Secretary of the Interior." The regulatory procedure set up pursuant to the Act is set forth at 25 C.F.R. Part 171 (now Part 211 (1982)). Kerr-McGee argues that the regulatory scheme is so pervasive that it preempts all power on the part of the Tribe to deal with mineral leases, including the power to tax. It notes that the regulations allow for a lone exception: 25 C.F.R. § 171.29 provides that the provisions of the regulations "may be superseded by the provisions of any tribal constitution, bylaw, or charter issued pursuant to the Indian Reorganization Act." The Navajo Tribe has elected not to organize under the Indian Reorganization Act ("IRA") and has not adopted a constitution. Kerr-McGee argues that the provisions of the regulation thus operate to preempt any power to tax the Kerr-McGee mineral leaseholds.

We reject this argument for several reasons. First, Kerr-McGee misinterprets the purpose of the 1938 Act. Its purpose was not to generate distinctions between tribes organized under the IRA and tribes not so organized, but rather was to "bring all mineral leasing matters in harmony with the Indian Reorganization Act." S. Rep. No. 985, 75th Cong., 1st Sess., at 3 (1937); H.R. Rep. No. 1872, 75th Cong., 3rd Sess., at 3 (1938). At the time the 1938 Act was proposed, there was no statutory authority to lease lands on Indian Reservations created by executive order for mineral development (except oil and gas) in many states, unless a tribe had organized pursuant to Section 17 of the IRA, 25 U.S.C. § 477. *See* S. Rep. No. 985, *supra*, at 1-2. Tribes organized under Section 17 were empowered to lease their lands for periods of not more than ten years. *Id.* The purpose of

the 1938 Act was to abolish these distinctions by enabling all tribes to lease for mineral development. *See* S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, *supra* at 1.

Second, we note that there is nothing in the Mineral Leasing Act which inhibits the Tribe's inherent ability to tax as an essential attribute of sovereignty. In fact, nothing in the Act or its corresponding regulations mentions tribal taxation.[3] Bearing in mind the Supreme Court's admonition to "tread lightly in the absence of clear indications of legislative intent [with respect to federal divestiture of Indian taxing power]," 455 U.S. at 149, *quoting Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978), we conclude that the power to tax was not preempted by the Mineral Leasing Act.

IV. Breach of Contract—

In Count IV of its amended complaint Kerr-McGee asserts that imposition of the taxes on it constitutes a unilateral modification of its lease and a breach of an implied contract that the royalties there specified were to constitute the only monetary compensation. The Supreme Court, in *Merrion, supra*, has disposed of this contention. The Court there held that the payment of royalties under a lease does not exempt the lessee from payment of taxes. "The royalty payments from the mineral leases are paid to the Tribe in its role as partner in petitioners' commercial venture. The severance tax, in contrast, is petitioners' contribution 'to the general cost of providing governmental services.'" 455 U.S. at 138, *quoting Commonwealth Edison v. Montana*, 453 U.S. 609, 623 (1981). We are unable to find, therefore, any breach of contract on behalf of the Tribe.

V. Commerce Clause—

In Counts V, VI, VII and VIII, Kerr-McGee asserts that imposition of the taxes violates the Commerce Clause of the

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[3] On the contrary, the legislative history suggests that an important purpose of the Mineral Leasing Act was to secure for the Indians "the greatest return from their property." S. Rep. No. 985, 75th Cong., 1st Sess. at 2; H.R. Rep. No. 1872, 75th Cong., 3d Sess. at 2.

United States Constitution because the Business Activities Tax impairs the privilege of engaging in interstate commerce and imposes multiple taxation without apportionment and because both taxes discriminate against interstate commerce.

The Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution, empowers Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The extent to which the negative implications of the Interstate Commerce Clause, in striking down state laws for creating burdens on interstate commerce, should be applied to tribal laws under the Indian Commerce Clause, has never been authoritatively determined. In *Merrion, supra*, the Supreme Court acknowledged that the Commerce Clause has been used by the Court "as a shield to protect Indian tribes from state and local interference". 455 U.S. at 153-54. It declined to decide whether the clause could be used to strike down the tax before the Court, holding that the tax did, in any event, pass the tests established for judging burdens imposed on commerce between the states. *Id.* 154, 156-158. We adopt the same course. [4]

Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977), held that a tax survives an Interstate Commerce Clause challenge if it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

[4] The Court in *Merrion* did take note of the fact that the Jicarilla Tribe had adopted a constitution pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, and had secured the approval of the Secretary of the Interior to the constitution and to the tax. 455 U.S. at 155. This was cited to establish the fact that Congress had provided steps by which approval of a tax could be secured and that such affirmative Congressional action eliminated the need for judicial scrutiny of the tax under the Commerce Clause. The Court further held, however, "The tax challenged here would survive judicial scrutiny under the Interstate Commerce Clause even if such scrutiny were necessary." *Id.* at 156. It is the Court's rationale at this point that we follow here.

The first two requirements are met here since the mining activities taxed occur entirely on reservation land. *Merrion, supra*, 455 U.S. at 157. The Possessory Interest Tax applies only to leases on lands under tribal jurisdiction. The Business Activities Tax is apportioned to fall only on activity occurring on lands under tribal jurisdiction. The value taxed is the value of the goods within the reservation or at the time the goods are transported outside of the reservation. The law thus escapes any multiple taxation problem by limiting its application to on-reservation value.

Under the third requirement, the question is whether the taxes discriminate in favor of local commerce by providing an advantage not enjoyed by interstate commerce. Kerr-McGee asserts that this is the case. It points to certain exemptions in the Business Activities Tax enjoyed by "traditional activities of Indians" and points out that few, if any, Indians would own leaseholds of a value making them subject to the Possessory Interest Tax. The Commerce Clause, however, looks not to ethnicity—Indian against non-Indian—but to competitive advantage in favor of local commerce. No such advantage is provided here.

As with the tax considered in *Merrion*, the Navajo taxes do "not treat minerals transported away from the reservation differently than [they treat] minerals that might be sold on the reservation." 455 U.S. at 157-58. There is, of course, nothing in the Commerce Clause which requires that all activities bear an equivalent tax burden. It is sufficient that there be no competitive disadvantage imposed for oil and gas sold on the reservation compared with oil and gas sold off the reservation. [5]

[5] Kerr-McGee also alleges that the Possessory Interest Tax discriminates because it excludes the activities and possessory interests of the Tribe. It is true that the Navajo taxes do exempt tribal governmental subdivisions. Yet *Merrion* upheld an analogous exemption in the Jicarilla tax, finding that such an exemption merely avoided "administrative make-work" and was not "a discriminatory preference for local commerce." 455 U.S. at 158. We are similarly persuaded.

As to the fourth prong, Kerr-McGee asserts that the Business Activities Tax is not related in any way to any benefits provided to it by the Tribe; that there is no relationship between the tax imposed and the benefits received. At least, it argues, it should have a right to establish a factual record as to the extent of benefits received and the relationship that that figure bears to the tax imposed.

In *Commonwealth Edison Co. v. Montana, supra,* 453 U.S. 609 (1981), the Supreme Court dealt with the questions presented by the fourth prong. It stated:

> The relevant inquiry ... is not ... the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong .... Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. ... Beyond that threshold requirement, the fourth prong ... imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact ....

453 U.S. at 625-26.

In *Commonwealth Edison,* the tax was a severance tax measured by a percentage of the value of coal taken. This was held to be "in proper proportion" to the activities within the state. "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society."' " *Id.* at 627. Accordingly, we find that the Business Activities Tax is sufficiently related to benefits provided to Kerr-McGee by the Tribe so as to survive a Commerce Clause challenge.

In that case Commonwealth Edison contended, as does Kerr-McGee, that factual inquiry should be had into the relationship between revenues generated by a tax and costs incurred on account of the taxed activity in order to assure that taxes are not excessive. The Court rejected this contention, stating: "The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." *Id.* at 627. It stated further: "In essence, appellants ask this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do." *Id.* at 628.

We conclude that all requirements of *Complete Auto Transit* have been met; that summary judgment in favor of the Tribe on all challenged counts should be affirmed.

NAVAJO TRIBE APPEAL

The District Court held both the Possessory Interest Tax and the Business Activities Tax invalid for the reason that approval of those taxes by the Secretary of the Interior had not been obtained. The Court took note of the fact that a tribe that had organized under the Indian Reorganization Act, 25 U.S.C. § 461, *et. seq.*, or the Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 631 *et. seq.*, would have to secure the Secretary's approval of its taxes. It noted that the Navajo Tribe had chosen not to organize under the IRA and had never adopted a constitution. It reasoned that the IRA manifested a Congressional policy in favor of organization of the tribes under constitutions approved by the Secretary; that a Congressional requirement of the Secretary's approval by an unorganized tribe such as the Navajo could be inferred because otherwise unorganized tribes could exercise greater power than those tribes that had acted in accordance with Congressional policy. It concluded: "[T]his court concludes that since Secretary approval is required for tax resolutions adopted pursuant to a tribal constitution surely Secretary approval must also be required for tax resolutions passed without a tribal constitution."

In this respect the District Court followed the holding of the District Court for the District of Utah in *Southland Royalty Co. v. Navajo Tribe of Indians, supra.* As we have

noted, the Tenth Circuit has reversed the Utah Court in that respect. It held:

> We do not agree that there is support for this requirement [of Secretarial approval] in the statutes. The purpose of the IRA was to enable and encourage Indian self-government. Organization under the IRA was not the only form of self-government acceptable to Congress. One of the ways in which the IRA reflects a respect for self-government was in the provision that makes adoption of a constitution optional. 25 U.S.C. § 476. The choice of government is in itself an act of self-government and consonant with Congressional policies. The self-sufficiency of the Navajo Tribe could be impaired by the imposition of a requirement of secretarial approval of its actions as to taxes.

Southland Royalty Co. v. Navajo Tribe of Indians, 715 F.2d 486, 489 (10th Cir. 1983).

We agree with the reasoning of the Tenth Circuit. We note that there is nothing in the Indian Reorganization Act or Navajo-Hopi Rehabilitation Act that requires tribes to submit their ordinances or resolutions to the Secretary for approval. It is true that tribal constitutions and charters of incorporation adopted pursuant to the IRA must be approved by the Secretary; yet, even as to organized tribes, the IRA itself does not require that any specific legislation be submitted for secretarial approval. Secretarial approval is required only of those tribes that have chosen to include such a requirement in their constitutions, bylaws or charters.

On the appeal taken by Kerr-McGee, JUDGMENT AFFIRMED. On the appeal taken by the Navajo Tribe, JUDGMENT REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

KERR-McGEE CORPORATION, a Delaware corporation, *Plaintiff*, vs. NAVAJO TRIBE OF INDIANS, et al., *Defendants*.	No. Civ. 80-247 Phx. WPC MEMORANDUM AND ORDER

Plaintiff, Kerr-McGee Corporation, leased reservation land from the defendant, Navajo Tribe, for the purpose of conducting mineral operations. This action was originally brought on May 10, 1979, in the United States District Court for the District of New Mexico. The suit challenges the validity of the Business Activity Tax and the Possessory Interest Tax adopted by the Navajo Tribal Council in 1978.

Although these taxes are both long resolutions, plaintiff's complaint fairly summarizes their pertinent parts. The Possessory Interest Tax purports to require plaintiff: (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one half (½) due on February 15 and one-half (½) due on August 15 of each calendar year. The Tax applies to every leasehold interest on or under the reservation that has a value in excess of $100,000 at a rate of not less than one percent (1%) nor greater than ten percent (10%), which rate is presently set at three percent (3%).

The Business Activity Tax, on the other hand, purports to require plaintiff: (1) to file declarations of tax due on

May 15, August 15, November 15 and February 15 of each calendar year, (2) to pay taxes purportedly due on the said dates, and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax was effective as of July 1, 1978, and applies to every sale, either within or without the reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%), which rate is presently set at five percent (5%).

Both the Business Activity Tax and the Possessory Interest Tax purport to empower the Navajo Tax Commission to impose a number of penalties in the event of noncompliance, including "permanent loss of all right to engage in productive activity" on or under the reservation. Neither tax resolution has been approved or disapproved by the Secretary of the Department of the Interior.

The New Mexico District Court transferred the portion of the complaint which related to plaintiff's Arizona operations to this Court. Thereafter, on October 2, 1980 plaintiff filed an amended complaint. The amended complaint alleges in ten counts that the taxes are invalid for the following reasons: (1) lack of inherent power to tax, (2) treaty limitations on tribal power, (3) federal preemption of the regulation of operations under oil, gas and mineral leases for reservation land, (4) breach of contract, (5) violation of the commerce clause: imposition on the privilege of engaging in interstate commerce, (6) violation of the commerce clause: discrimination against interstate commerce, (7) violation of the commerce clause: multiple taxation, (8) lack of due process and equal protection, (9) lack of approval by the Secretary of the Interior, and (10) failure of the Secretary to carry out his mandatory duty to ensure that the mineral leases are not breached by tribal regulations which he has not approved.

Meanwhile, on March 8, 1979, a suit virtually identical to this one was filed in the United States District Court for the

District of Utah. *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140 (D. Utah, filed March 8, 1979). In *Southland*, various oil companies brought suit against the Navajo Tribe to contest the validity of the Business Activity Tax and the Possessory Interest Tax. The complaint was very similar to the one presented here. Various motions for summary judgment and dismissal were filed. The Court heard these motions after the Tenth Circuit's decision in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), but prior to the United States Supreme Court's decision in that case.

On August 27, 1980, the Utah District Court issued its judgment. The Court declared that the Business Activity Tax and the Possessory Interest Tax were unlawful, void, and of no effect, unless and until they were lawfully approved by the Secretary of the Interior of the United States. *Southland* (amended judgment Aug. 27, 1980). However, in its memorandum and order, the Utah Court also held that: (1) the Tribe had an inherent power to tax, (2) the taxes were not barred by treaty, (3) the Tribe's power to tax was not preempted by federal law, (4) the taxes did not breach the mineral leases, (5) the taxes in no way violated the commerce clause, and (6) the taxes did not infringe upon the individual rights of due process and equal protection. *Id.* (memorandum and order June 5, 1980).

Just after the *Southland* order was issued by the Utah District Court, the Navajo Tribe moved for summary judgment in this case on Counts I thru VIII of Kerr-McGee's complaint. However, on January 5, 1981, this Court stayed all proceedings pending the United States Supreme Court decision in *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894 (1982). On January 25, 1982 the Supreme Court rendered its decision in *Merrion*. The opinion upheld a severance tax imposed by the tribe on "any oil and natural gas severed, saved and removed from Tribal lands." *Id.* at 899, 913. Thereafter, on March 5, 1982, Kerr-McGee moved for summary judgment on Count IX of the complaint, claiming that the taxes are void for lack of Secretary approval. Both motions for

summary judgment are now before the Court. Plaintiff's motion will be considered first.

Plaintiff's Motion for Summary Judgment on Count IX

Plaintiff argues that (1) the Tribe should be collaterally estopped from contesting the necessity of Secretary approval because *Southland* was determinative of the issue, and (2) in any event, under the merits of Count IX, the taxes are void for lack of Secretary approval. Hence, this Court must initially determine whether the doctrine of collateral estoppel is applicable. Since this action arises under the laws of the United States, federal law will be applied, rather than state law. *See, Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation,* 402 U.S. 313, 325 (1971).

Generally, collateral estoppel is appropriate where:

> (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Oldham v. Pritchett, 599 F.2d 274, 279 (8th Cir. 1979). In other words, the doctrine forecloses litigation of "issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment between the parties, whether on the same or a different claim." *Segal v. American Telephone and Telegraph Co.,* 606 F.2d 842, 845 (9th Cir. 1979).

In this case, collateral estoppel is appropriate. First, the issue presented here is identical to the one presented in *Southland.* The exact same tax resolutions of the Navajo Tribe were contested. Second, there was a final judgment on the merits in *Southland.* Moreover, the conclusion that the taxes were void due to a lack of Secretary approval was determinative of the suit. Third, the party against whom the plea is asserted was a party to the prior adjudication. The defendant, Navajo Tribe, also defended the suit in *Southland.* Fourth, the Tribe was given a full and fair opportunity to be heard on the adjudicated issue.

The requirement that the estopped party be given a full and fair opportunity to litigate the issue is a heavy factor in determining whether the doctrine should be applied. If the estopped party could not foresee subsequent suits on the issue, or had no incentive to vigorously litigate the prior suit, he may not have been given a full and fair opportunity to litigate the adjudicated issue. *See, Parkland Hosiery Co. v. Shore,* 439 U.S. 322, 332 (1979). Thus, the defendant, Tribe, "must be permitted to demonstrate, if [it] can, that [it] did not have 'a fair opportunity procedurally, substantively and evidentially to pursue [its] claim the first time.'" *Blonder-Tongue* 402 U.S. at 333, *quoting Eisel v. Columbia Packing Co.,* 181 F. Supp. 298, 301 (D. Mass. 1960).

The Navajo Tribe has not shown that it was denied a full and fair opportunity to litigate the issue of Secretary approval in *Southland.* Subsequent suits challenging the taxes were clearly foreseeable. In fact, the Tribe was aware that suits were pending in New Mexico and Arizona. Thus, the Tribe had every incentive to litigate the Utah case fully and vigorously. Moreover, it is evident from the record in *Southland* that the Tribe did in fact vigorously contest the allegation that the taxes were void due to lack of Secretary approval.

In its brief, the Tribe asserts five arguments why collateral estoppel should not be applied in this case. However, all five of the arguments must fail.

First, the Tribe argues that the doctrine is inapplicable because Kerr-McGee was not a party to the first suit, and thus could not be bound by it. This argument is a restatement of the common law rule of "mutuality". However, the binding rule of "mutuality" has been abandoned by the United States Supreme Court. *Blonder-Tongue,* 402 U.S. at 324, 350; 1B *Moore's Federal Practice,* ¶0.412[1] at 1806 n.12 (2d ed. Supp. 1982). Consequently, the rule no longer limits this Court in the application of collateral estoppel.

Second, the Tribe argues that collateral estoppel is inapplicable because Kerr-McGee is attempting to use the doctrine "offensively". Offensive use of collateral estoppel occurs

when a plaintiff seeks to estop a defendant from relitigating an issue which the defendant previously litigated and lost against another plaintiff. *Parkland Hosiery,* 439 U.S. at 329. Although there are many persuasive arguments which may be advanced as to why collateral estoppel should not be used "offensively", the Supreme Court recently concluded that:

> the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Id. at 331.

In this case, there is no reason why collateral estoppel should not be applied, even if it is used "offensively". Kerr-McGee could not have easily joined in the *Southland* action. The company has no mineral operations on Navajo lands in Utah. In fact, the New Mexico District Court, in which Kerr-McGee originally filed its complaint, refused to hear claims with respect to the company's operations in Arizona. Instead, it transferred that portion of the case to this Court. In short, this is not a case where the party seeking to apply collateral estoppel has been "lying and waiting" for the result in the first suit. Furthermore, for the reasons previously stated, the application of collateral estoppel will not be "unfair" to defendant. The Tribe had a "full and fair opportunity" to litigate its claims. Moreover, the judgement in *Southland* is not inconsistent with any previous decisions.

Third, the Tribe argues that collateral estoppel is inapplicable because the issue of Secretary approval is a legal, not a factual, issue. It is true that collateral estoppel "has never been applied to issues of law with the same rigor as to issues of fact." *Segal,* 606 F.2d at 845. Thus, "when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate." *Montana v. United States,* 440 U.S. 147, 162 (1979). Nevertheless, the doctrine

of collateral estoppel is often applied to issues of law. *See id.* at 150-51; 1B *Moore's Federal Practice* ¶0.448 at 4234 (2d ed. 1982).[1]

In this case, even though an issue of law is involved, collateral estoppel is particularly applicable. The present action does not involve subject matter unrelated to the prior action. In fact, the subject matter is identical. This case and *Southland* both involve the same Navajo tax resolutions. Moreover, both cases challenge the tax resolutions for the same reasons. A litigant is not entitled to more than one full and fair opportunity for judicial resolution of the same identical issue, whether it be one of law or fact.

Fourth, the Tribe argues that collateral estoppel is inapplicable because the United States Supreme Court decision in *Merrion* was handed down after *Southland.* Clearly, the doctrine of collateral estoppel should not be imposed if there has been a change of law or controlling legal principles have changed significantly since a previous judgment. *See, Montana,* 440 U.S. at 155; *Segal,* 606 F.2d at 845. However, there is no reason why collateral estoppel should not be imposed in this case.

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[1] In *Montana v. United States,* 440 U.S. 147 (1979), the plaintiff, contractor, financed and directed by the United States, attacked the constitutionality of a Montana tax in the state court system. The Montana Supreme Court upheld the tax. *Id.* at 150, 151. Plaintiff subsequently abandoned his request for review by the United States Supreme Court. *Id.* at 151. Instead, the federal government went ahead with its suit in United States District Court challenging the constitutionality of the state tax. *Id.* The District Court held that it was not bound by the state court decision and it struck down the tax as violative of the Supremacy Clause. *Id.* at 151-52.

The United States Supreme Court held that the government, having lost in state court, was collaterally estopped from challenging the tax in federal court. *Id.* at 164. Thus, the doctrine was applied despite the fact that an issue of law was involved, i.e., the validity of the tax. This is very similar to the situation presented here. The Tribe, having had a full and fair opportunity to litigate the validity of its tax, is estopped from seeking a contrary resolution of that issue here.

The United States Supreme Court decision in *Merrion* did not "significantly change" the law. It merely affirmed the Tenth Circuit's decision which the District Court of Utah relied upon in *Southland*. Moreover, the *Merrion* decision only indirectly dealt with the issue of Secretary approval. The issue was in no way determinative or necessary to the result. Furthermore, the opinion's indirect treatment of that issue supports the result reached in *Southland*.[2] Therefore, there is no change of law which precludes the application of collateral estoppel. If the Tribe wishes to argue that *Merrion* mandates a reversal of the result reached in *Southland*, it is free to do so on its appeal of the *Southland* decision to the Tenth Circuit.

Fifth, the Tribe argues that the unique circumstances of tax litigation have exempted such actions from the doctrine of collateral estoppel. It is generally true that "a tax dispute which has been litigated and pursued to judgment is res judicata only as to subsequent proceedings involving 'the same tax year' as the previous litigation." *Texaco Inc. v. United States* 579 F.2d 614, 616 (Ct.Cl. 1978), *quoting Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). Before a party can invoke the doctrine of collateral estoppel for the different tax year, "the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." *Sunnen*, 333 U.S. at 601-02. Accordingly, the Tribe argues that the doctrine cannot be invoked here because Kerr-McGee's leases are different from the leases at issue in *Southland*.

However, the leases have no bearing whatsoever on whether Secretary approval is necessary for the challenged taxes to become effective. Although, as the Tribe states, a taxpayer cannot estop the United States from litigating the

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[2] The merits of Count IX, i.e., whether the Navajo tax resolutions must in fact be approved by the Secretary, and what effect the *Merrion* decision has on that issue, is discussed in a later section of this memorandum and order.

application of tax statutes to particular taxable events in a subsequent year, this case does not deal with the application of taxes to a certain event. Rather, plaintiff challenges the validity of the taxes themselves. The doctrine of collateral estoppel can clearly be invoked to preclude a party from challenging the validity of a tax, which it had previously challenged, and lost. *See, Montana*, 440 U.S. at 150, 164. Thus, the Tribe can properly be estopped from relitigating the validity of the taxes themselves.

Moreover, this result is consistent with the policy behind the doctrine of collateral estoppel. One of the major purposes of the doctrine is to foster "reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-54. If the doctrine is not applied in the present case, inconsistent decisions could easily arise on an identical issue: the validity of the Navajo tax resolutions. If inconsistent decisions were rendered, the same identical tax would be enforceable on one portion of the reservation, but unenforceable on another portion of the reservation. This result should be avoided.

Accordingly, for the reasons previously stated, this Court holds that the Tribe is collaterally estopped from relitigating the issue of whether the taxes are invalid for lack of Secretary approval. The Tribe has already had a full and fair opportunity to litigate that precise issue. The proper place for further litigation of that issue is on the appeal of *Southland* to the Tenth Circuit.

However, even assuming the Tribe is not collaterally estopped, Kerr-McGee is entitled to judgment as a matter of law on the merits of Count IX. The *Southland* decision is current, valid authority which is entitled to weight under the rule of stare decisis. Thus, in accordance with the following discussion, the result reached is identical.

The substantive issue of Count IX is whether the Navajo tax resolutions are void and of no effect because they lack Secretary approval. The Tribe cle[illegible] has the inherent, sovereign power to tax the mining [illegible]tivities of Kerr-McGee.

See, Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 905 (1982). However, the issue here is whether Secretary approval is necessary to "exercise" that power.

Out of proper respect for both tribal sovereignty and the plenary authority of Congress, courts must tread lightly in this area in the absence of clear indications of legislative intent. *Id.* at 908. The Tribe argues that since Congress has not "expressly" deprived it of its inherent, sovereign power to tax, it retains this power, regardless of Secretary approval. The District Court of Utah was faced with all these arguments when it rendered its decision in *Southland*. It concluded that although there was no statutory authority which "expressly" required that the Secretary approve the Navajo tax resolutions, such approval was required for a number of reasons. *Southland*, slip op. at 15-16 (order of June 5, 1980). This Court agrees.

In 1934, Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.* This Act authorized any tribe residing on a reservation to "organize" by adopting its own constitution and bylaws. *Id.* at § 476. The Navajo Tribe chose not to organize under this Act. Sixteen years later, Congress enacted the Navajo-Hopi Rehabilitation Act (NHRA), 25 U.S.C. § 631 *et seq.* This Act specifically offered the Navajo Tribe the opportunity to "organize" by adopting a constitution. *Id.* at § 636. Once again, however, the Navajo Tribe chose not to do so.

If the Navajo Tribe had "organized" itself by adopting its own constitution pursuant to either Act, clearly it would have been required to obtain Secretary approval before it could impose the taxes at issue. *See*, 25 U.S.C. § 476; 25

U.S.C. § 636.[3] Under these Acts, "a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers." *Merrion* 102 S.Ct. at 911. Consequently, this Court must determine whether the Navajo Tribe is also required to obtain the approval of the Secretary, even though it chose not to "organize" under either Act.

The Navajo Tribe contends that since it never adopted a constitution, both Acts are inapplicable and thus the approval of the Secretary is not required. However, this Court concludes that since Secretary approval is required for tax resolutions adopted pursuant to a tribal constitution, surely Secretary approval must also be required for tax resolutions passed without a tribal constitution. *See, Southland*, slip op. at 14 (order of June 5, 1980).

> Although Congress never intended to require a tribal constitution, Congress certainly did intend to encourage the Navajos to adopt one. However there is no such encouragement if on the one hand tribes adopting a constitution must have that constitution approved by the Secretary, but on the other hand tribes without a constitution may govern solely by tribal resolution without need for Secretarial approval. In fact this state of affairs would encourage tribes *not* to adopt a tribal constitution, because to do so would be to place limits on tribal self-government that would not otherwise exist.

Id. The Indian Reorganization Act, and the Navajo-Hopi Rehabilitation Act were intended to grant more power to the

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[3] The Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, provides that tribal constitutions and bylaws must be "approved by the Secretary of the Interior." *Id.* at § 476. Moreover, "[a]mendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws." *Id.*

Likewise, the Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 631 *et seq.*, provides that the Navajo Tribe has the right to adopt a tribal constitution which "shall become effective when approved by the Secretary." *Id.* at § 636. Amendments to the tribal constitution are also allowed with the specific approval of the Secretary. *Id.*

tribes, not to place limits on self-government that would not otherwise exist. Thus, Congress has implicitly required Secretary approval for tax resolutions adopted by a tribe without a constitution.

The Mineral Leasing Act of 1938 (MLA), 25 U.S.C. §§ 396a-g, requires that the Secretary approve all leases granted to non-Indians for oil, gas, or mining purposes. *Id.* at § 396b. The Tribe argues that since this Act only requires the approval of the Secretary to lease, such approval is not required to tax the lessors. In other words, there is no "clear indication" that Congress intended to limit the Tribe's taxing power by making it contingent upon Secretary approval. However, this argument must also fail.

Clearly, all operations under oil, gas or mineral leases are subject to the rules and regulations of the Secretary. 25 U.S.C. § 396d. However, one purpose of the MLA was to:

> help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, *subject to the approval of the Secretary, where before the responsibility for such decisions was lodged in large part only with the Secretary.*

Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112 (9th Cir. 1981), *amended* 665 F.2d 1390 (1982) (emphasis added). Thus, under the terms of the MLA, if a tribe adopted a constitution pursuant to the Indian Reorganization Act, comprehensive authority over oil and gas leasing on the reservation would pass to the tribe. *Southland*, slip op. at 14 (order of June 5, 1980). "Without a tribal constitution, that comprehensive regulatory authority remains with the Secretary under 25 U.S.C. §§ 396a-g." *Id.* at 14-15. Therefore, since the approval of the Secretary is required even if the Tribe has adopted a constitution, and this authority has passed to the Tribe, such approval must also be required if the Tribe does not have a constitution and such authority remains with the Secretary.

Accordingly, it appears that Congress indeed "intended to require Secretarial approval of tribal tax resolutions, passed without [the] benefit of a tribal constitution, if such resolutions could have a significant effect on reservation oil and gas leases." *Id.* at 15. "Congress intended that the Secretary would examine these taxes to determine whether they are consistent or inconsistent with the federal regulatory framework." *Id.* Although there is no express statutory language requiring Secretary approval.

> Congressional intent for such a requirement must be inferred from the requirement that the Secretary approve tribal constitutions, from the delegation of regulatory authority over reservation oil and gas leases to the Secretary, in the absence of a tribal constitution, and from the historical relationship between the Interior Department and the Navajo Tribal Council.

Id. at 15-16. [4]

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[4] Both parties argue that *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894 (1982), substantiates their respective positions. However, the Jicarilla Apache Tribe in *Merrion* had adopted a constitution under the Indian Reorganization Act (IRA). Thus, *Merrion* did not directly concern the issue of whether the Secretary must approve tax resolutions passed by a tribe who has not adopted a constitution.

However, the opinion does include language which supports the result reached in this case. The Court stated that:

> the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Id. at 903. The Court thus concluded that mandatory Secretarial approval would (i) minimize potential concern that tribes might exercise their taxing power in an unfair manner, and (ii) ensure that any exercise of the tribal taxing power would be consistent with national policies. These goals

Therefore, whether the Tribe is collaterally estopped to contest the issue of Secretarial approval or the Court considers the merits of the issue, the result is the same. The Navajo Business Activity Tax and the Possessory Interest Tax are void and of no effect, unless and until, they receive the lawful approval of the Secretary of the Interior of the United States. The Tribe has the inherent, sovereign power to tax, but the approval of the Secretary is the event necessary to "effectuate" these taxes. Thus, there are no genuine issues of material fact, and plaintiff, Kerr-McGee, is entitled to summary judgment for the allegations in Count IX of its amended complaint.

The Tribe argues that a summary judgment for plaintiff on Count IX would be improper because the United States is

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are desirable whether or not the tribe has adopted a constitution. Moreover, the need to accomplish these goals may even be greater when the tribe has not adopted a constitution.

The *Merrion* opinion also stated that Congress had:

> affirmatively acted by providing a series of federal check-points that must be cleared before a tribal tax can take effect. Under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax non-members. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe was required again to obtain approval from the Secretary. See Revised Constitution of the Jicarilla Tribe, Art. XI, §§ 1(e), 2. Cf. 25 U.S.C. §§ 476, 477 . . . .

Id. at 911. The Court thus concluded that it was not its function, nor its prerogative, to strike down a tax that had travelled through the precise channels established by Congress, and had obtained the specific approval of the Secretary. *Id.*

Hence, although approval of the Secretary was required because the Tribe was "organized" under the IRA, and the Jicarilla tribal constitution itself required such approval, the Court clearly endorsed the use of, and deferred to, the process of Secretarial approval. Moreover, the language and authority used by the Court indicate that Secretarial approval should always be required in order to effectuate the process Congress intended to establish for the adoption of tribal tax resolutions, and to ensure that such taxes are both fair and consistent with national policies.

a "necessary" and "indispensable" party which the Court has no jurisdiction over. Plaintiff's amended complaint added Counts IX and X, and joined the Secretary of the Interior as a defendant. However, plaintiff never served the United States with process. As a result, the United States has not participated in this lawsuit. Consequently, the Tribe argues that in its absence, summary judgment should be denied, and the suit dismissed as to all parties on Counts IX and X. However, this Court concludes that the United States is not a "necessary " or "indispensable" party for plaintiff's motion for summary judgment, since it only covers Count IX of the complaint.

Rule 19 of the Federal Rules of Civil Procedure is entitled "Joinder of Persons Needed for Just Adjudication". It describes when a person is *necessary* to a suit.

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Fed. R. Civ. P. 19(a). If a person is "necessary", but cannot be made a party, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person

being thus regarded as *indispensable*. Fed. R. Civ. P. 19(b) (emphasis added.) [5]

The United States is not "necessary" to this motion. Plaintiff has only motioned this Court for summary judgment on Count IX of its complaint, not Count X. Count IX alleges that the tribal tax resolutions are invalid until approved by the Secretary. Count X alleges that the Secretary has a mandatory duty to ensure that mineral leases are not breached by tribal tax resolutions which lack his approval.

The Secretary was made a defendant because a portion of the relief requested in the complaint seeks specific declaratory and injunctive relief against the Secretary, to require him to restrain the Tribe from enforcing the taxes. However, this portion of the relief requested only pertains to the allegations of Count X.

Count IX, on the other hand, neither seeks relief from the Secretary nor seeks to impose any duties on the Secretary. The only relief requested in the complaint applicable to Count IX requests that the taxes be declared null, void, invalid and unenforceable against plaintiff. In granting plaintiff's motion for summary judgment on Count IX, this Court only grants that relief. The taxes are declared to be null, void, invalid and unenforceable against plaintiff unless and until Secretarial approval is obtained. This judgment does not bind the United States and it does not affirmatively order the Secretary to do anything. In fact, the United States has no substantial interest in the validity of these taxes.

[5] The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
Fed. R. Civ. P. 19(b).

Consequently, complete relief for Count IX can be accorded among those already parties, and the United States is not so situated that disposition of the action in its absence would impair its ability to protect its interest or leave any person already a party subject to substantial risk. Therefore, the United States is not a "necessary" party for Count IX of the complaint. Fed. R. Civ. P. 19(a). [6] The summary judgment for plaintiff on Count IX is thus proper, even though the United States has not been joined as a party.

Defendant's Motion for Summary Judgment on Counts I thru VIII

Initially, the defendant, Tribe, argues that if it is estopped to contest Count IX because of the *Southland* decision, then plaintiff, Kerr-McGee, should be estopped to contest Counts I thru VIII since they were likewise decided by *Southland*. However, litigants who have never appeared in a prior action may not be collaterally estopped without litigating the issue. *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971). If persons have never had a chance to present their arguments on a claim, "[d]ue process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Id.* Accordingly, because Kerr-McGee was not a party to the prior suit, it cannot be estopped from bringing the claims in Counts I thru VIII of the complaint.

Defendant has motioned this Court for summary judgment on each of the claims contained in Counts I thru VIII. Plaintiff concedes in its reply that the recent Supreme Court decision in *Merrion* requires a dismissal of Count I. Clearly, the Tribe has the inherent sovereign power to tax non-Indians. Plaintiff also concedes that *Merrion* requires a dismissal of the breach of contract claim asserted in Count IV. Thus, the only claims left on the motion for summary judg-

[6] Moreover, even assuming the United States is a "necessary" party, it is clearly not an "indispensable" party under Rule 19. Fed. R. Civ. P. 19(b).

ment are the ones contained in Counts II, III, V, VI, VII and VIII. For the following reasons, defendant is entitled to summary judgment on all six of these claims. However, since each of the claims is distinct, each will be discussed separately.

COUNT II

Kerr-McGee alleges in Count II that the Treaty of June 1, 1868, 15 Stat. 667, entered into between the United States and the Navajo tribe, prohibits the Tribe from imposing the taxes at issue. However, nothing in the Navajo Treaty of 1868 bars the tribal taxes. *Southland*, slip op. at 6 (order of June 5, 1980). Neither tribal consent to "works of utility or necessity" on the reservation, nor any other language in the Treaty, specifically precludes the imposition of these taxes. *Id.*

COUNT III

Plaintiff alleges in Count III that the Mineral Leasing Act (MLA), 25 U.S.C. §§ 396a-g, preempts the Navajo Tribe from taxing oil and gas lessees, such as Kerr-McGee. The MLA establishes an extensive regulatory procedure for the leasing of oil and gas interests on tribal lands. The authority for such leases is delegated to the Secretary. *Id.* at § 396d. However, if a Tribe "organizes" under the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*, much of the authority over the leases passes to the Tribe. *Southland*, slip op. at 14 (order of June 5, 1980). *See, Merrion* 102 S.Ct. at 908, *citing* 25 U.S.C. § 396b. Accordingly, Kerr-McGee argues that since the Navajo Tribe has not adopted a constitution under the IRA, the regulatory authority remains with the Secretary, rather than passing to the Tribe, thus preempting the Tribe from imposing the challenged taxes.

However, the absence of a tribal constitution does not deprive the Navajos of their power to tax. The inherent tribal power to tax recognized in *Merrion* predates the IRA. *Southland*, slip op. at 7 (order of June 5, 1980). Therefore, this power exists regardless of the tribe's organization. Moreover, as previously discussed in this order, the MLA

implicitly requires that tribal taxes be approved by the Secretary, even if the Tribe is not "organized" under the IRA. Thus, although the MLA may require Secretarial approval, it does not preempt the Tribe's power to tax its lessee's mineral operations.

COUNTS V thru VII

Plaintiff alleges in Counts V thru VII that the challenged taxes violate the commerce clause by (1) taxing the privilege of engaging in interstate commerce, (2) discriminating against interstate commerce, and (3) imposing multiple taxation, without allocation.

This Court recognizes that any review of tribal action under the Interstate Commerce Clause is not without conceptual difficulties. *Merrion*, 102 S.Ct. at 909-10. However, even assuming that the taxes are subject to the Interstate Commerce Clause, there is no violation.

Courts only review state actions under the Commerce Clause when Congress has not acted or purported to act. *Id.* at 910.

> Judicial review of state taxes under the Interstate Commerce Clause is intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States. . . .
>
> Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

Id.

In *Merrion*, the Court held that Congress had affirmatively acted by providing a series of federal check points which had to be cleared before tribal taxes could take effect.

Id. at 911. Under the IRA, tribes were required to obtain Secretarial approval before they could adopt or revise their constitution to tax non-members. *Id.* Further, before the tax ordinances could take effect, the tribes were required to again obtain the approval of the Secretary. *Id.*

The tribal tax at issue in *Merrion* had been enacted in accordance with that scheme. *Id.* Both the tribal constitution and the tax ordinance had been approved by the Secretary. *Id.* Therefore, the "administrative process established by Congress to monitor such exercises of tribal authority" had been fulfilled. *Id.*

As a result, the Court concluded that the tribal tax had come to them in a:

> posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.

Id. Consequently, the Court held that it was not its prerogative to strike down a tax that had traveled through the precise channels established by Congress, and had obtained the specific approval of the Secretary. *Id.* Thus, scrutiny under the Commerce Clause was unnecessary.

Likewise here, this Court has held that the Secretary must approve of the Navajo taxes even though the Tribe is not "organized" under the IRA. Although there is no statute expressly requiring Secretary approval for tribes not "organized" under the IRA, such approval was inferred from the requirement that the Secretary approve tribal constitutions, from the delegation of regulatory authority over reservation oil and gas leases to the Secretary in the absence of a tribal constitution, and from the historical relationship between the Interior Department and the Navajo Tribal Council. Thus, like *Merrion*, this Court concluded that Congress had affirmatively acted by requiring that the Navajo tax resolutions be approved by the Secretary.

Secretary approval fulfills the administrative process established by Congress to monitor such exercises of tribal authority. The taxes will have no effect until they receive specific federal approval. Therefore, unlike an unapproved state tax, judicial review is not needed to ensure that the taxes will not unduly burden or discriminate against interstate commerce. Since Congress has acted, this Court is not free to review the tribal taxes under the dormant Commerce Clause. [7]

COUNT VIII

Count VIII of the complaint alleges that the Navajo taxes effect a taking of plaintiff's property without just compensation and deny plaintiff equal protection, in violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*, and the Fifth Amendment of the Constitution of the United States. However, neither claim may be brought in this court.

An Indian tribe is not a federal instrumentality. It is a separate sovereign, pre-existing the Constitution. The tribe is therefore unconstrained by constitutional provisions framed specifically as limitations on federal or state authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Thus, the Navajo Tribe is not within the reach of the Fifth Amendment. *See id.; Trans-Canada Enterprises v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980); *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971)

Furthermore, this Court has no jurisdiction to hear a suit brought under the ICRA. The Supreme Court clearly held in *Santa Clara* that federal courts do not have jurisidiction to hear claims brought under § 1302 of the ICRA. 436 U.S. at 72. *See, Trans-Canada*, 634 F.2d at 476; *Barnes v. White*, 494 F. Supp. 194, 196-98 (N.D.N.Y. 1980); *Shubert Construction Co. v. Seminole Tribal Housing Authority*, 490 F.

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[7] The Court offers no opinion on the merits of plaintiff's claims in Counts V thru VII. Congress has struck the balance it deems appropriate. Thus, the Court is no longer needed to prevent a possible burden on commerce. *See, Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 910 (1982).

Supp. 1008, 1009-10 (S.D. Fla. 1980). The sole remedy in federal court for an alleged violation of the ICRA is an application for habeas corpus relief under § 1303. *Santa Clara*, 436 U.S. at 70; *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 278-79 (9th Cir. 1981); *Trans-Canada*, 634 F.2d at 476. This [sic], this Court has no jurisdiction to hear the claims brought by plaintiff in Count VIII, under either the Fifth Amendment or the Indian Civil Rights Act. [8]

[8] Plaintiff argues that the Tenth Circuit case of *Dry Creek Lodge Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied* 449 U.S. 1118 (1981), mandates a contrary result. In *Dry Creek* a non-Indian attempted to operate a business on land owned within the reservation. A dispute arose concerning an access road on the land. The non-Indian business operator sought a remedy with the tribal court, but the court refused to hear the case. The tribal judge indicated that he could not incur the displeasure of the tribal council, which had not given its consent to the suit. *Id.* at 684. Although the claim was under § 1302, the federal court held it had jurisdiction. *Id.* at 685. It concluded that the reasons for limiting federal jurisdiction under the ICRA disappear when (1) no other relief or remedy is available, (2) the issues are not related to internal tribal affairs, and (3) the issue concerns a non-Indian. *Id.* Accordingly, under this reasoning, Kerr-McGee contends that *Santa Clara* was only applicable to intra-tribal disputes. This would allow a non-Indian to bring suit under the ICRA in federal court.

However, the Court is compelled to reject this contention. The *Santa Clara* holding is very clear. Federal courts have no jurisdiction to hear any claim brought under § 1302 of the ICRA regardless of whether plaintiff is an Indian or a non-Indian. 436 U.S. at 72. Thus, this Court declines to follow the reasoning of *Dry Creek*. *See, R. J. Williams Co. v. Fort Belknap Housing Authority*, 509 F. Supp. 933, 939-41 (D. Mont. 1981) (court declined to follow reasoning of *Dry Creek* in face of the clear broad holding in *Santa Clara*).

Furthermore, even if this Court followed the reasoning of *Dry Creek*, it would have no jurisdiction to hear Kerr-McGee's claim under § 1302 of the ICRA. Under the reasoning of *Dry Creek*, federal courts have jurisdiction over an action against an Indian tribe only if no tribal remedy exists. *Kenai Oil and Gas Inc. v. Department of Interior*, 522 F. Supp. 521, 531 (D. Utah 1981). If there is a tribal remedy, then, under *Dry Creek*, this Court has no jurisdiction, even if the dispute is not intra-tribal. *Id.* In this case, Kerr-McGee has a tribal remedy. It is free to bring an action under the ICRA in Navajo Tribal Court.

Accordingly, for each of the reasons so stated, there are no genuine issues of material fact and the defendant, Navajo Tribe, is entitled to judgment as a matter of law for Counts I thru VIII of the complaint. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962); Fed. R. Civ. P. 56 (c).

IT IS ORDERED:

1. Plaintiff's motion for summary judgment on Count IX of the complaint is granted, in accordance with the above discussion.

2. Defendant's motion for summary judgment on Counts I thru VIII of the complaint is granted, in accordance with the above discussion.

DATED June 29, 1982.

/s/
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHLAND ROYALTY COMPANY, PHILLIPS PETROLEUM COMPANY, et al.; THE SUPERIOR OIL COMPANY, et al.; TEXACO, INC., et al., vs. THE NAVAJO TRIBE OF INDIANS, et al., *Defendants.*	Case No. C 79-0140 C 79-0153 C 79-0237 C 79-0296 MEMORANDUM OPINION and ORDER

These are consolidated actions filed by various oil company plaintiffs against defendants that include the Navajo Tribal Council, the Navajo Tax Commission, various tribal officers, and various state and federal agencies and officers. Plaintiffs assert interests in oil and gas leases located on the Navajo Indian Reservation in San Juan County, Utah and seek injunctive and declaratory relief against the enforcement of tribal taxes imposed on the leases. In the event the tribal taxes are upheld, plaintiffs seek similar relief prohibiting the enforcement of taxes imposed by the State of Utah and San Juan County relating to the same leases.

Numerous sources of federal subject matter jurisdiction are alleged, including 28 U.S. C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity of citizenship), 28 U.S.C. § 1337 (actions affecting commerce), 28 U.S.C. § 1343 (Civil Rights), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. § 2201 (declaratory relief) and 5 U.S.C. § 704 (Administrative Procedure Act). Personal jurisdiction is alleged under Federal Ruies of Civil

Procedure, Rule 4(e) and *Utah Code Annotated* § 78-27-24. Venue is alleged to be appropriate in this District and Division under 28 U.S.C. § 1391.

The tribal taxes under attack are CJA-13-78 which imposes an annual tax of 1% - 10% of the value of lease interests on the reservation and CAP-36-78 which taxes 4% - 8% of the gross receipts of certain business activities on the reservation. Both of these taxes are the subject of tribal resolutions enacted in 1978 and provide for monetary penalties, seizure of assets and banishment of business proprietors from the reservation, in the event of non-compliance.

Numerous claims have been asserted in the several complaints filed in these actions, including claims that:

1. The taxes exceed tribal authority because not authorized by Congress or because they are barred by the Tenth Amendment to the United States Constitution;

2. The taxes exceed tribal authority because not authorized by the Secretary of the Interior;

3. The Secretary of the Interior violated the Administrative Procedure Act by failing to review and disapprove the taxes, or by acting without proper administrative procedures;

4. The taxes violated provisions of the written oil leases, or the tribe is estopped by the leases;

5. Pursuant to 25 U.S.C. § 398c, only the State of Utah has the power to tax these leases;

6. The taxes violate the Treaty of 1868, and the penalties for non-payment are "quasi-criminal" and may not be imposed upon non-Indians;

7. The taxes deny Constitutional rights to Due Process and Equal Protection of the Laws, and they violate the Civil Rights Act and the Indian Civil Rights Act (25 U.S.C. § 1302);

8. The taxes unlawfully impede Interstate Commerce and the power of Congress to regulate commerce with the Indian tribes;

9. Assuming the tribal taxes are legal, the state and local taxes are illegal, under a variety of theories.

In addition, the state and county defendants have filed counterclaims and cross-claims seeking a determination that their taxes are valid. In C 79-0296, which has proceeded somewhat differently than the other cases because only tribal officers and the Secretary of the Interior have been named as defendants, the state and county parties have filed a Complaint in Intervention seeking a similar determination.

On September 4, 1979 the court heard oral arguments on all motions then pending. All parties in these cases appeared through counsel, and all motions were fully briefed. The Navajo defendants withdrew their Motion seeking summary dismissal of certain plaintiffs' motions. The court granted Southland's Motion to Amend its Complaint in C 79-0140. The court took the rest of the motions under advisement, and now intends to rule upon them.

These motions are:

1. The federal defendants' Motions to Dismiss the Complaints in all of the cases, for failure to state a claim, on the grounds that there is no federal authority to approve or disapprove tribal taxing resolutions, and if such authority exists it is discretionary authority not subject to mandamus;

2. The federal defendants' Motions to Dismiss cross-claims filed in all cases except C 79-0296, and their Motion to Dismiss the Complaint in Intervention in C 79-0296, all on the grounds that no relief is sought against the federal government and that to the extent relief is sought no claim of mandamus can be stated against the federal government on the tribal taxing resolutions;

3. The Navajo defendants' Motions to Dismiss the Complaints in all cases, Motions to Dismiss cross-claims and Motion to Dismiss the Complaint in Intervention in C 79-0296. These defendants allege that the various pleadings fail to state a cause of action, that sovereign immunity of the tribe bars subject matter jurisdiction; that tribal offi-

cials are also protected by sovereign immunity because acting in their official capacities, that the court is without authority to review tribal laws, that if the court has authority it should abstain in favor of tribal courts, that insufficient facts have been pled to establish claims of breach of lease agreements and claims of interference with commerce, that the claims of lack of tribal authority to tax are contrary to law, that the court has no jurisdiction of claims under the Indian Civil Rights Act, and that the state and county defendants and intervenors lack standing. Also, because the Complaint in C 79-0296 does not name the tribe as a defendant, the Navajo defendants move to dismiss that Complaint on the ground that the tribe is an indispensable party who cannot be joined without defeating subject matter jurisdiction;

4. Motions to Compel Discovery against the Navajo defendants, filed by plaintiffs in C 79-0140 and C 79-0153. The Navajo defendants have resisted discovery, pending the outcome of their dispositive Motions to Dismiss.

As to the federal defendants' Motion to Dismiss the Complaint in Intervention in C 79-0296 and their Motions to Dismiss cross-claims in the other cases, to the extent no relief is requested by the state and county against the federal government these motions are moot and to the extent relief is requested these motions will be governed by the resolution of the federal defendants' Motion to Dismiss the Complaints.

As to the Navajo defendants' Motions to Dismiss the Complaint in Intervention and the cross-claims, the court finds the state and county parties have standing, if for no other reason than the alternative claims of the plaintiffs attacking the taxing authority of the state and county parties. Other grounds raised by the Navajo defendants will be governed by the outcome of the Navajo defendants' other dispositive motions.

Thus the key motions to be decided are those of the Navajo and federal defendants attacking the Complaints of the oil

company plaintiffs. Also, the state and county parties filed Motions to Dismiss based on 28 U.S.C. § 1341 and Motions for Summary Judgment based on 25 U.S.C. § 398c. At a hearing held on April 14, 1980, the court denied the Motions to Dismiss and took the Motions for Summary Judgment under advisement. The court now intends to rule on these Motions for Summary Judgment as well.

After some of the pending motions in these cases were taken under advisement, the Tenth Circuit Court of Appeals issued a decision in the consolidated cases *Merrion, et al. v. Jicarilla Apache Tribe, et al.*, No. 78-1154 (10th Cir. Feb. 22, 1980) and *Mobil Oil Corp., et al. v. Jicarilla Apache Tribe, et al.*, No. 78-1251 (10th Cir. Feb. 22, 1980). This Tenth Circuit decision (hereinafter referred to as *Merrion*) upheld a tribal severance tax imposed by the Jicarillas on reservation oil and gas leases. Because of the obvious impact of *Merrion* on the motions pending before this court, oral arguments based on *Merrion* were heard March 13, 1980 at the court's request. It is the court's opinion that *Merrion* controls most of the issues now before the court. Supplemental briefs addressing *Merrion* have been filed by the parties.

Navajo Defendants' Motions to Dismiss Complaints

In light of *Merrion* and other cases, the defense of sovereign immunity will protect the tribal governmental entitites, which entities shall be dismissed from these actions, but not the tribal officers. The tribal entities may participate if they wish, but they are not indispensable parties whose dismissal or absence would require dismissal of the claims against the tribal officers. Also, there appears to be no good reason for the court to abstain in favor of tribal courts, where the issues remaining after *Merrion* primarily involve interpretation of federal law rather than tribal law. *Merrion* establishes that the court has authority to determine whether the tribal tax resolutions violate federal law.

Among the other grounds urged by the Navajos in support of dismissal is the contention that none of the various claims

pled by the plaintiffs state a cause of action upon which relief can be granted. As indicated above, rather than list each claim of each plaintiff, the court has categorized the claims. Each category will be discussed below in terms of what remains, if anything, after *Merrion*.

Claims that the power to tax is beyond the inherent, sovereign authority of the Navajo Tribe, and that the taxes in this case must fail for want of specific Congressional approval are claims that must be dismissed under *Merrion*. *Merrion* holds that the Indian tribes have all sovereign authority, including the authority to tax non-Indians operating within the reservations, except that authority specifically withdrawn by treaty or federal legislation or authority that is inconsistent with some dominant federal interest.

The court has read the Navajo Treaty of 1868, 15 Stat. 667, and finds nothing in that treaty that would bar the taxes at issue. *Merrion* indicates that a general ceding of tribal civil or criminal jurisdiction is not sufficient. (*See* Article I of Navajo Treaty). Neither tribal consent in Article IX to "works of utility or necessity" on the reservation, nor any other language in the Navajo treaty, precludes the taxes at issue, according to standards of treaty interpretation applied in *Merrion*. The court notes in passing that Article II of the Treaty appears to recognize the Navajos' right to exclude non-members from the reservation and that the Senate ratified the Treaty, as if dealing with a foreign sovereign. Claims based on the Treaty of 1868 must be dismissed.

Regarding Congressional withdrawal of the power to tax, *Merrion* disposed of the contention that 25 U.S.C. § 398c, which empowers the state to tax oil and gas leases on executive order reservations, withdrew taxing authority from the Indian tribes. Claims relying on § 398c must also be dismissed.

Plaintiffs in *Merrion* argued that in 25 U.S.C. §§ 396a-g Congress established a comprehensive regulatory scheme governing oil and gas leasing on the reservations, which is administered by the Secretary of the Interior, and that this

scheme precluded tribal taxation of oil and gas leases. The Tenth Circuit rejected that argument based on 25 U.S.C. § 396b, which transfers regulatory authority over oil and gas leasing to those tribes that have adopted a corporate charter and tribal constitution pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 476 and 477. Since the Jicarillas had adopted a charter and constitution, §§ 396a-g did not apply to them.

The Navajos have not adopted a charter and constitution, even though they were given still another opportunity to do so in 25 U.S.C. § 636. The absence of a tribal charter and constitution by itself would not deprive the Navajos of their power to tax, because the tribal sovereignty discussed in *Merrion* predates the Indian Reorganization Act, which Act merely recognized the incidents of sovereignty existing at the time it was passed. However plaintiffs here argue that because Congress enacted a comprehensive regulatory scheme, and because 25 U.S.C. § 396d gave the Secretary of the Interior regulatory authority over oil and gas operations on the reservations as part of that scheme, Congress intended that tribal resolutions impacting oil and gas operation required Secretarial approval, unless enacted pursuant to a tribal constitution.

A related argument is that because tribal constitutions adopted either under 25 U.S.C. § 477 or 25 U.S.C. § 636 require Secretarial approval, Congress intended that tribal resolutions passed without benefit of a tribal constitution also require Secretarial approval. Because these arguments regarding Secretarial approval are not directly controlled by *Merrion*, and because these arguments also related to the federal defendants' Motions to Dismiss, they will be discussed in more detail below.

Still a third argument regarding Secretarial approval is contained in plaintiffs' claims alleging that the tribal tax resolutions were, in effect, amendments to the written oil and gas leases and that because the Secretary had to approve the original oil and gas leases, he also had to approve the

amending resolutions. Lack of Secretarial approval was not an issue in *Merrion* because the Secretary had approved the Jicarilla resolution, based on a requirement in the Jicarilla Constitution. Claims against the Secretary based on that approval were abandoned at trial in *Merrion*. However *Merrion* did consider and reject contentions that the Jicarilla resolution violated oil and gas lease provisions barring unilateral changes in rentals or royalties. These lease provisions are virtually identical to lease provisions before this court. Plaintiffs here argue that the Navajo resolutions either are lease amendments requiring Secretarial approval, or are invalid because in conflict with and estopped by express lease terms.

The court feels that the Tenth Circuit rationale for finding no lease violations also applies to the lease violation claims here, to the claims that the Navajo resolutions amended the leases, and to the claims that the Navajos are estopped by the leases. The Tenth Circuit reasoned that the tribe acts as a property owner in agreeing to lease royalties and rentals, but it acts as a sovereign in establishing taxes on those same leases. Unless the tribe specifically agrees not to tax in the lease, and there was no such agreement either here or in *Merrion*, the tribe is not barred from imposing taxes paid in addition to lease rentals and royalties. If tribal taxes on oil and gas output and on lease interests are to be distinguished in this fashion from tribal royalty agreements on the same output and rental agreements on the same lease interests, the taxing resolutions cannot be construed as forfeiting or amending the royalty and rental agreements, and these agreements do not estop the exercise of the taxing authority. The Navajo resolutions, in contrast to the Jicarilla resolution, do not even specifically single out oil and gas leases, and on their face the Navajo resolutions apply to a much broader range of property interests than just interest in oil and gas leases. Thus, claims that the Navajo resolutions forfeit or violate the leases, claims that the resolutions amend the leases, and claims that the leases estop the taxes, all must be dismissed.

Plaintiffs also plead claims alleging that the tribal taxes are barred by the reservation of powers contained in the Tenth Amendment. Tenth Amendment considerations were not expressly considered in *Merrion*. Nevertheless the court feels that the general *Merrion* analysis requires dismissal of the Tenth Amendment claims as well. Tribal sovereignty does not spring from the United States Constitution, but rather predates it. Also the Constitution expressly gives Congress the exclusive authority to control relations with the Indian Tribes, which apparently includes authority to treat the tribes as self-governing entities, as opposed to following an assimilation policy. Otherwise, over 100 years of federal Indian law no longer applies.

Plaintiffs have filed claims alleging that the taxing resolutions violate rights to Due Process and Equal Protection under either the U. S. Constitution and Civil Rights Acts or the Indian Civil Rights Act, 25 U.S.C. § 1302. There are also claims that the Commerce Clause and Indian Commerce Clause are violated and that the penalties for non-payment of the taxes are "quasi-criminal". *Merrion* apparently was not confronted with the Indian Civil Rights Act, possibly because the Jicarilla Constitution expressly incorporated the United States Constitution. Also, the Jicarilla tax is somewhat different than the Navajo taxes. However the Tenth Circuit did examine several Constitutional questions in determining that there was no dominant federal interest subverted by the Jicarilla tax, and much of what *Merrion* had to say on these questions applies here, whether the claims are based on the U. S. Constitution and Civil Rights Acts or the Indian Civil Rights Acts.

In *Merrion*, the Tenth Circuit found that the only conceivable Due Process violation in the tribal taxing authority was if that authority masked the exercise of some different and forbidden power, such as the confiscation of property without just compensation. In *Merrion*, the trial court made a factual finding that some of the lessees could not afford to absorb the tribal taxes and would be forced to shut down oil and gas wells, resulting in an unjust transfer of the wells to

tribal control. The Tenth Circuit did not overturn this factual finding, but nevertheless it held that the Jicarilla tax was not confiscatory. As written, the Navajo taxes, including the penalties for non-payment, are no more confiscatory or "quasi-criminal" than the Jicarilla tax. Although plaintiffs here ask the court to foresee a confiscatory application of the taxes and the penalties for non-payment, this is speculative since the taxes have not been enforced yet, no taxes have been paid and no penalties imposed. At this point, the court can only interpret the tax resolutions on their face, and according to the *Merrion* analysis, they pass muster. The court does not believe that under *Merrion* the Navajos need to demonstrate any particular level of governmental services offered in return for the taxes, beyond existing tribal consent for plaintiffs to do business on the reservation.

As to Equal Protection, the Navajo resolutions on their face appear to apply to Indians as well as non-Indians, and tribal members as well as non-members. (*See* § 9 of the business activity tax and § 21 of the possessory interest tax.) Although the tribe itself is exempt, *Merrion* does not require that the tribe tax itself in order to avoid claims of discrimination. Again, plaintiffs argue that the effect of certain other exemptions, when applied together, will result in a discriminatory application. Again, the court cannot forsee at this point how the taxes will be applied. However the foregoing analysis indicates that, even assuming this court has jurisdiction over Indian Civil Rights Act claims, and even assuming plaintiffs' have standing to bring those claims, plaintiffs have not pled a cause of action that would entitle them to relief under the Indian Civil Rights Act. Claims that the Navajo taxes violate Due Process or Equal Protection whether under the Constitution, Civil Rights Acts or Indian Civil Rights Act must be dismissed.

In analyzing the Commerce Clause, Article I, Section 8, Clause 3, *Merrion* held that the analysis applied to commerce "among the several states" also applies to commerce "with the Indian Tribes". The Commerce Clause does not ban tribal taxes impacting commerce. It does limit these

taxes so as to prevent discrimination against interstate commerce and to prevent multiple burdens on interstate commerce. The Jicarilla tax did not breach either of these limitations. The issue before this court is whether the differences between the Jicarilla tax and the Navajo taxes could lead to a different result here.

As to the Navajo possessory interest tax, it is clear that the tax does not violate either the Commerce Clause or Indian Commerce Clause, as those constitutional provisions are analyzed in *Merrion*. The tax is the equivalent of an ad valorem real property tax, but is imposed on leaseholds rather than freehold interests. As such, it is a tax even more "local" in character than the Jicarilla tax in *Merrion*. Again, the fact that the sovereign exempts itself from the tax does not make the tax discriminatory. Also, an ad valorem real property tax, like a severance tax, is not the type of tax that imposes "multiple burdens" on commerce, even though a double burden may be created if the state or county can impose a tax under 25 U.S.C. § 398c.

The business activity tax, which is a sales tax or gross receipts tax, is not as "local" in nature as either a severance tax or an ad valorem real property tax. Plaintiffs argue that they may be able to show through discovery that competing intra-state businesses exist on the reservation and are the beneficiaries of discrimination against plaintiffs' inter-state business, and that all of plaintiffs' goods and services subject to the tax are destined for immediate entry into commerce. They also argue that the tax is imposed at the point goods and services enter commerce and is therefore a tax on commerce rather than a tax on "local" activity such as mining.

However on its face, the tax ordinance does not discriminate between intra-state and inter-state commerce, because in § 3(b) it purports to tax sales "either within or without the Navajo Nation". The tax is directed at "local activities" (see the definition of "Navajo Goods" in § 3(c) of the tax ordinance) as well as inter-state activities, even though certain retail businesses and farming and livestock activities are ex-

empt. It is not the "privilege" of engaging in inter-state commerce that is taxed but the "privilege" of doing business on the reservation, whether that business is inter-state or intra-state.

Plaintiffs allege that under § 3(b)(i) of the ordinance, the tax is imposed as goods and services are transported off the reservation. However the sale of goods and services is taxed whether or not the goods and services are transported off the reservation. This section merely fixes a measure of the tax for those goods and services that are transported off the reservation. It is analagous to the Jicarilla provision imposing a tax on oil and gas 'sold or transported off the Reservation', which was upheld by *Merrion* and was interpreted to mean that the taxable event was severance, whether or not the oil and gas was sold on the reservation or transported elsewhere before sale. Here, the taxable event is a sale, whether or not the goods and services which are sold leave the reservation.

Thus, plaintiffs' claims that most or all of the oil and gas they produce are transported off the reservation are of no avail, since in *Merrion* the court found that even though 80% of the products which were taxed entered commerce, and even if this entry was immediate, and even if the cost of interstate commerce was increased, commerce was not discriminated against where the terms of the tax ordinance did not differentiate between intra-state and inter-state activities. The same rationale appliès here, regardless of what plaintiffs' discovery might show. Also, as noted above, the business activities tax precludes discrimination against non-members of the tribe in § 9, and the exemption of the tribal sovereign from the tax is not discriminatory.

On the "multiple burden" question, this tax is not the type of tax that could be imposed by every state with equal right because the tax is tied to the source of the goods and services that are sold. That source is the Navajo Reservation, so that in a sense the tax is like a severance or other tax on "local activity". Thus claims that the Navajo taxes

breach the Commerce Clause or Indian Commerce Clause must be dismissed.

Federal Defendants' Motions to Dismiss

As indicated above, both the federal defendants and Navajo defendants argue that the Secretary of the Interior has no authority to review the Navajo taxes. The Secretary declined to review these taxes based upon that alleged lack of authority. If he does have authority, then exercise of that authority could be a pre-condition to the validity of the taxes.

Although plaintiffs cite several sources of statutory authority alleged to apply, the most persuasive arguments are that Secretarial approval is required, in the absence of a tribal constitution, because of federal pre-emption of regulatory authority over reservation oil and gas activities under 25 U.S.C. §§ 396a-g, or that because Secretarial approval of tribal constitutions is required under 25 U.S.C. § 477, and approval of the Navajo constitution in particular is required under 25 U.S.C. § 636, resolutions passed without a tribal constitution also require Secretarial approval.

In their supplemental briefs, plaintiff oil companies argue for the first time that the Navajo Tribal Council is not the governing authority of the Navajo Tribe. This argument is without merit. Although initially the Tribal Council was the creation of the Interior Department rather than the tribe, it is universally recognized as the existing, legally constituted governing body of the tribe, acting with all of the sovereignty of the tribe. Congress never intended, either in 25 U.S.C. §§ 476 and 477, or in 25 U.S.C. § 636, that enactment of a tribal constitution was a pre-condition to the Tribal Council's exercise of the tribe's sovereign authority. However the Council's status as the creation of the Interior Department does add more weight to the argument that Congress intended to require the approval of the Secretary of the Interior for these taxing resolutions, in the absence of a tribal constitution.

Although Congress never intended to require a tribal constitution, Congress certainly did intend to encourage the

Navajos to adopt one. However there is no such encouragement if on the one hand tribes adopting a constitution must have that constitution approved by the Secretary, but on the other hand tribes without a constitution may govern solely by tribal resolution without need for Secretarial approval. In fact this state of affairs would encourage tribes *not* to adopt a tribal constitution, because to do so would be to place limits on tribal self-government that would not otherwise exist.

Encouragement for a tribal constitution *is* provided by 25 U.S.C. § 396b. With a tribal constitution approved by the Secretary, comprehensive regulatory authority over oil and gas leasing on the reservation passes to the tribe. Without a tribal constitution, that comprehensive regulatory authority remains with the Secretary under 25 U.S.C. §§ 396a-g. It appears to the court that Congress intended to require Secretarial approval of tribal tax resolutions, passed without benefit of a tribal constitution, if such resolutions could have a significant effect on reservation oil and gas leases.

Although plaintiffs argue that in 25 U.S.C. §§ 396a-g Congress intended to pre-empt tribal taxes on oil and gas leasing, the court believes that Congress intended that the Secretary would examine these taxes to determine whether they are consistent or inconsistent with the federal regulatory framework. This intent was not fulfilled by the Secretary's pro forma determination that the tribal taxes were not "leases" or "royalties". Regardless of the label, the Secretary should have examined the tribal resolutions to determine their impact on the very regulatory system he is charged with administering.

The Secretary argues that if he has the authority to review these resolutions, he has a great deal of discretion in deciding whether to disapprove them. This may be true, but such discretion would not extend to the issue of whether to review at all, if Congress intended that he would exercise a review function upon proper application. The Secretary also argues that it is not his function to protect the oil companies. Again, this may be true. However if, as the plaintiffs

argue, these taxes will discourage or prevent outside development of reservation oil and gas resources, the Secretary may have a duty to determine whether these taxes are in the tribe's best interests, and whether they frustrate any dominant federal policy embodied in the existing regulatory authority over oil and gas leasing. Although the Secretary contends his duties here don't run to the plaintiffs, if the tribal taxes require his approval, he should remain in the lawsuit.

The court agrees with defendants that there is no express statutory language requiring Secretarial approval as a precondition to the validity of the Navajo tax resolutions. However the court finds that Congressional intent for such a requirement must be inferred from the requirement that the Secretary approve tribal constitutions, from the delegation of regulatory authority over reservation oil and gas leases to the Secretary, in the absence of a tribal constitution, and from the historical relationship between the Interior Department and the Navajo Tribal Council. Thus, the federal defendants' Motions to Dismiss will be denied. Except as to those claims made against tribal officers that Secretarial approval of the Navajo tax resolutions was required as a precondition to their validity, the Navajo defendant's Motions to Dismiss will be granted. The Motions to Dismiss will be denied as to the claims alleging Secretarial approval was required.

Motions for Summary Judgment of San Juan County and the State of Utah

The state and county parties contend that 25 U.S.C. § 398c specifically authorizes their taxes at issue in this case. Plaintiffs argue that the subsequent legislation embodied in 25 U.S.C. §§ 396a-g by its terms repealed "inconsistent" statutes, including § 398c, and that leases issued after 1938 are exempt from § 398c. This subsequent legislation was otherwise silent as to state taxation of reservation oil and gas leases. From this silence, the Interior Department has inferred a Congressional intent not to permit state taxation;

which intent would render § 398c "inconsistent". Although this agency's interpretation is entitled to some weight, statutory construction is a question of law that is primarily for the court to determine.

Plaintiffs allege that their claims against the state and local taxes apply only if the Navajo taxes are upheld. However it appears to the court that the question of the validity of the state and local taxes is independent from the question of the validity of the Navajo taxes, and that unless § 398c has been repealed, the state and local taxes must be upheld. These are the types of taxes that have traditionally been held constitutional under both the Commerce Clause and the Due Process Clause. Although the state may be limited in its power to tax the tribe and tribal assets, the tax falls upon plaintiffs rather than on the Tribe. Even though a tax that creates a "double burden" may impose financial hardship, financial hardship is not a basis for setting aside a tax, and federal, state and local taxes regularly are imposed on the same or similar activity without running afoul of the "multiple burden" analysis discussed in *Merrion*.

The court cannot believe that Congress intended to repeal § 398c simply by the repeal of statutes "inconsistent" with §§ 396 a-g. This is boiler plate language used in many federal statues and it seems just as likely that Congress intended to continue to permit state taxation within its regulatory framework as it does that Congress intended to proscribe state taxation. Since repeal of federal statutes by implication is not favored, and since § 398c was only eleven years old when §§ 396a-g were passed, the inference to be drawn from Congressional silence here is that Congress intended to preserve § 398c rather than to do away with it.

More importantly, there are no facial inconsistencies between § 398c and §§ 396a-g, and there is nothing in the legislative history to show that Congress thought state taxation would undermine federal or tribal regulation of reservation oil and gas leasing. The only alleged "inconsistency" that plaintiffs can identify is the speculation that

financial hardship on them will ultimately be detrimental to the Tribe as well. Although plaintiffs seek discovery to buttress this speculation, until the Navajo tax resolutions are applied, the court can only interpret them on their face. Discovery as to projected impacts of the taxes would not add anything, because these projections are speculative themselves, especially as they relate to the contention that plaintiffs will be driven from the reservation as the result of either non-payment of the taxes or the economic hardship caused by payment.

Also, the court has ruled above that Congress intended in §§ 396a-g that the Secretary would examine tribal resolutions affecting oil and gas leasing on the reservation, to determine whether they will cause adverse impacts on the tribe or frustration of a federal policy. The Secretary's determination would have to take into account the existence of state and local taxes, regardless of his opinion as to their legality.

Thus the court will grant the Motions for Summary Judgment of San Juan County and the State of Utah, and as a corollary will dissolve the prior Order permitting plaintiff Southland Royalty Company to deposit its state and local taxes with the court.

Motions to Compel — Need for Discovery

The only claims remaining in these actions are those alleging that the tribal tax resolutions are invalid for want of approval by the Secretary of the Interior. The court has determined as a matter of law that such approval is a precondition to validity. A final Order based on that determination must await dispositive motions requesting particular relief. As to the plaintiffs' claims that the court is dismissing, discovery was not necessary because the factual issues related to premature and speculative contentions about the future application and impact of the tax resolutions. Therefore further discovery would not be appropriate, and the pending Motions to Compel will be denied.

Finally, the parties have submitted and the court has considered affidavits and other documents beyond the pleadings

and legal memoranda. Thus the court is treating the Motions to Dismiss as Motions for Summary Judgment pursuant to Rule 12(b), Federal Rules of Civil Procedure. However any fact disputes raised were not deemed material to the interpretation of the Navajo tax resolutions as written, or to other legal issues determined by the court. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the court finds that as to those claims the court is dismissing, there is no just reason for delay in entering a final Judgment of Dismissal, and the court directs that such final Judgment be entered.

Therefore, in light of the foregoing, the court hereby Orders:

1. Except as to those claims made against tribal officers that approval by the Secretary of the Interior is a precondition to the validity of the Navajo tax resolutions, the Motions to Dismiss of the Navajo defendants are Granted. The Motions to Dismiss are denied as to the claims alleging Secretarial approval was required. To the extent these Motions to Dismiss are granted, the court directs that a final Judgment of Dismissal be entered pursuant to Federal Rules of Civil Procedure, Rule 54(b).

2. The Motions to Dismiss of the federal defendants are Denied.

3. The Motions for Summary Judgment of San Juan County and the State of Utah are Granted, and the court directs that a final Judgment of Dismissal be entered pursuant to Rule 54(b), as to all claims against San Juan County and the State of Utah.

4. The court's Order of December 7, 1979 permitting Southland Royalty Company to deposit state and local taxes with the court is Dissolved.

5. The pending Motions to Compel Discovery are Denied.

DATED this 5 day of June, 1980.

BY THE COURT:

/s/ BRUCE S. JENKINS
BRUCE S. JENKINS
United States District Judge